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# A GENERAL ABRIDGMENT OF Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

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*FAVENTE DEO.*

THE SECOND EDITION.

VOL. XI.

London:

PRINTED FOR

G. G. J. AND J. ROBINSON, T. PAYNE, E. AND R. BROOKE, T. WHIELDON AND J. BUTTERWORTH;

AND L. WHITE, Dublin.

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**Execution.**

# Execution.

## (N. a) Scire Facias.

### In what Caſes there ought to be a Scire Facias.

### And where Execution may be by Fieri Facias, Capias, or Elegit, without Scire Facias.

### *After the Year upon Error brought.*

[1. IF a man recovers debt or damages, and the *judgment is affirmed in writ of error in another court within the year*, yet he ſhall not have an execution there without a *ſcire facias*, becauſe the court is changed. 20 E. 2. Execution, 133. (Quære, whether this differs from the Exchequer Chamber.) 15 H. 7. 16. b.]

Aſſiſe in the county of E. the defendant was found a diſſeiſor with force, and within the year the record was removed by certiorari into the Chancery, and from thence into C. B. by mittimus, and after the defendant was taken by capias pro fine regis within the year, and defendant offered ſurety pro fine regis, and prayed to go at large; and the plaintiff prayed that he may remain for his execution, and by the opinion of the Court, he ſhall not remain for the execution of the party, becauſe now the party ought firſt to have ſci. fa. though it be within the year, becauſe the record and capias awarded is in another court than where the plea is; for per Frowike, where record is removed by writ of error in B. R. and affirmed within the year, yet the plaintiff ſhall have ſci. fa. before capias or elegit; for in alia curia. Br. Execution, pl. 59. cites 14 H. 7. 15. and 15 H. 7. 5. —— So where the teſtator recovers and dies within the year, the executor ſhall have ſci. fa. within the year; for alia perſona. Per Mordaunt. Ibid. —— But of a record removed out of the county into Bank the plea ſhall be held as in the county; for there is no coming out of a court of record. Ibid. —— And if all the juſtices of C. B. die, and others are choſe, yet they ſhall have ſuch execution as if the firſt judges were alive; for this is in one and the ſame court. Ibid. —— And of pleas in the county, if the juſtices in eyre come there they ſhall hold the pleas, and ſhall make ſuch execution as the county ſhall make, which the juſtices agreed, and the caſe where the juſtices died alſo. Ibid. —— And per Vaviſor, if a fine executory be removed out of the Bank into the Treaſury, and returned by certiorari and mittimus within the year, yet the party ſhall not have execution by habere facias ſeiſinam, but ſci. fa. though it be within the year. Ibid. —— Br. Scire Facias, pl. 119. cites S. C.

Note, in the reſidue of this caſe the beſt opinion was, that it appears by the mittimus that the plaintiff had not execution in pais before the juſtices of aſſiſe by elegit or fi. fa. and yet by award the defendant found ſurety pro fine regis, and went quit; for it is in another court now, and therefore the party ſhall have ſci. fa. as well as after the year; for if in treſpaſs the defendant is convicted, and after the year the king ſues capias pro fine, by which he is taken, he ſhall not ſtay in execution for the party; for the party cannot have execution by capias after the year, but within the year; ideo nota. But otherwiſe of the king by his prerogative. Br. Execution, pl. 61. cites 14 H. 7. 19, 20.

If the record is removed out of C. B. into B. R. by writ of error, and the judgment affirmed, the plaintiff ſhall not have execution there, though it be within the year, without ſuing ſcire facias, becauſe the record is now in another court, and before other judges. Br. Executions, pl. 119. (bis) cites 21 Aſſ. 14.

Lane, 20. Paſch. 4 Jac. in the Exchequer. S. P. and ſeems to be S. C.

[2. If a man *recovers* debt or damages *in B. R. and after within the year the defendant brings writ of error in the Exchequer Chamber*, where the *firſt judgment is affirmed after the year expired*, yet the recoveror may have execution by capias or fieri facias within the year after the affirmance without a ſcire facias; for the affirmance is a new judgment. M. 5 Ja. in the Exchequer, per Cur.]

[ 2 ]

Lane, 20. Dennis v. Drake, S.P. and ſeems to be S. C.

[3. *So* if *after the year* after the recovery the defendant *brings writ of error, and the judgment is affirmed*, though before the writ of error brought the recoveror was put to his ſcire facias, yet this affirmance is a new judgment, and the recoveror may have within the year after the affirmance, a fieri facias, or capias, without ſcire facias. M. 5 Ja. in the Exchequer, per Cur. M. 12 Ja. B. R.]

So if after the year the writ of error in the Exchequer-chamber abates by the death of any of the plaintiffs,

[4. *So* if he be *nonſuited in the writ of error*, for there though there is not any new judgment given in affirmance of the firſt judgment, yet the writ of error revives it. M. 12 Ja. B. R.]

[5. *So* if the *writ of error be diſcontinued*, yet he who recovered is not put to his ſcire facias, for the bringing of the writ of error has *revived the firſt judgment*. M. 12 Ja. B. R. adjudged between SIR HENRY * BELLOWES AND HANFORD.]

execution may be taken out within a year after the abatement without any ſci. fa. to revive the judgment, but it is neceſſary that a remittitur be entered to warrant the execution from B. R. For till then the record remains in the Exchequer-chamber, and unleſs a remittitur be entered the plaintiff muſt ſue out a ſcire facias. But if a remittitur be entered, the Court will not examine into the time of its entry; per Cur. Carth. 236. Howard v. Pitt. ——— That for want of entering a remittitur the execution will be erroneous, but not void, and denied 4 Le. 197. Ruſſel's caſe. 1 Salk. 261. Howard v. Pitt. ——— Carth. 237. S. C. ——— If the plaintiff in writ of error be nonſuited after the year, the plaintiff in the firſt action ſhall have ſcire facias, and ought to have the party returned warned, or to have 2 nihils returned before execution be awarded. Br. Execution, pl. 97. cites 5 E. 4. 6.

* Roll. Rep. 104. pl. 43. S. C. & S. P. admitted.

A ſtatute is the more expedite remedy, ſince thereupon execution may be taken out without a ſci. fa. or other ſuit, which cannot be in the caſe of a recognizance; for there if a year be paſt after the acknowledgment no execution can be ſued againſt the party himſelf acknowledging it, without a ſci. fa. firſt ſued out againſt him, and if he be dead, then though the year be not paſt yet muſt a ſcire facias be ſued, and thereupon the executor defendant may plead ſome plea to hold off the execution for a time. Wentw. Off. Executor, 139.

See tit. Error (K).

[6. If *A. recovers againſt B. in B. R. damages and coſts*, and upon this has *judgment againſt the bail* after ſcire facias, &c. and after *B. and the bail join in a writ of error* upon the ſtatute in the Exchequer Chamber, and *after the year and the day paſſes*, in this caſe, notwithſtanding this writ of error, the court of B. R. may grant execution; for it is a *void writ of error*, and as if no writ of error had been brought, and therefore it ſhall not be any continuance of the firſt judgment; but the year and the day being paſt, the plaintiff cannot have execution without a ſcire facias, though the year paſſed after the writ brought. Tr. 9 Car. B. R. adjudged per tot. Cur. between BARNES AND HILL.]

7. 13 E. 1. 45. After the year *a ſcire facias ſhall iſſue to ſhew cauſe why execution may not be done.*

8. In *replevin*, if the *plaintiff recovers damages*, and *error is brought*, and the *firſt judgment is affirmed* in B. R. he who recovers the damages cannot have fieri facias or elegit there at firſt, but ſci. fac. though it be within the year, becauſe the *record is come into*

*into another court* than where the firſt judgment was given, and it was ſaid there, that they may award *ſcire facias before the judgment affirmed*, and when the defendant comes, then to affirm the firſt judgment and award execution immediately; quod nota. Br. Scire Facias, pl. 151. cites 21 Aſſ. 14.

9. Scire facias upon a recognizance; the *defendant was returned dead*, and thereupon *garniſhment* ſhall iſſue *againſt the tertenants*, which was *returned* that they are *warned, and they did not come*, by which elegit was awarded; and ſo ſee that in ſcire facias upon recognizance a man ſhall have execution by elegit. Br. Elegit, pl. 16. cites 38 E. 3. 12.

10. Before the ſtatute which gave ſcire facias upon recovery, [ 3 ] *if the year had paſſed, and no execution made*, he ſhould not have execution, but yet *he might have had new original;* per tot. Cur.; for recovery without execution is no plea; quod nota. Per Thorp clearly there. Br. Executions, pl. 17. cites 43 E. 3. 2.

11. Elegit lies upon a recognizance. Br. Elegit, pl. 2. cites 44 E. 3. 10.

12. *At common law*, if a man had recovered in debt, and *did not take execution within the year*, he was put to a new original, but now by the ſtatute of Weſtminſter 2. he ſhall have ſcire facias, and yet he may have a new original if he will, &c. Arg. in treſpaſs. Br. Dette, pl. 10. cites 20 H. 6. 11. S. P. Br. Execution, pl. 5. by the beſt opinion cites S. C.

13. *If the plaintiff in* writ of *error nonſuited after the year*, the plaintiff in the firſt action ſhall have ſcire facias for execution. Br. Nonſuit, pl. 30. cites E. 4. 6. and 22 H. 6. 7.

14. Where the ſheriff returns upon a *fi. fa.* of 20*l.* quod *fieri feci* 10*l.* &c. and *has not the money in court at the day*, and another ſheriff is made, *ſci. fa. ſhall iſſue to the new ſheriff againſt the old ſheriff*, and thereupon fi. fa. or elegit, becauſe diſtringas vicecom' ad habend' denar', &c. is too long proceſs, &c. quod nota. Br. Executions, pl. 69. cites 9 E. 4. 50.

15. *If the court changes*, as if the record comes into B. R. by writ of error, and judgment is affirmed, the plaintiff himſelf who recovered ſhall not have fi. fa. againſt the defendant there, but firſt ſci. fa. Quod nota. Br. Execution, pl. 64. cites 15 H. 7. 14, 15. Br. Scire Facias, pl. 123. cites 15 H. 7. 15, 16. S. C.

16. A man condemned and *in execution for* 100*l. pleaded acquittance after the laſt continuance*, and it is ſaid that he *ſhall have ſci. fa. the ſame term*, and *audita querela in another term*, &c. and after he ſhall find ſureties and go at large. Br. Executions, pl. 73. cites 21 H. 7. 30. Br. Scire Facias, pl. 144. cites S. C.

17. If a man *recovers in writ of annuity*, he *ſhall have fi. fa. of the arrearages incurred within the year*, and *ſcire facias as ſoon as the annuity is arrear*, and never writ of annuity again; *for it is executory;* and *the ſame* law *of account and judgment upon compoſition, which is executory from time to time*, &c. And *in every ſcire facias in which he recovers after the firſt judgment he ſhall have execution thereof of the arrearages within the year by fi. fa.* For every one is founded upon the judgment. Br. Execution, pl. 119. cites 23 H. 8. and 32 E. 3.

18. Judgment was given in the county court, and a writ of falſe judgment was brought, only to delay the execution, upon which the record was removed, and the writ ſerved, and the plaintiff was non-ſuited; and thereupon the defendant prayed a ſcire facias to have execution, and upon good adviſement the writ wa granted, for otherwiſe he could have no judicial writ to have execution, becauſe the record ſhall not be ſent back again in alio comitatu. D. 329. a. b. pl. 14. Mich. 15 & 16 Eliz. Anon.

19. *At common law* there was no remedy for a judgment-creditor for debt or damages either againſt the body or lands of his debtor, unleſs in ſpecial caſe, but only as to his goods and chattels, and corn, and other preſent profit growing upon his land, to which purpoſe the common law gave him two ſeveral writs to be ſued within the year, viz. a *levari facias*, whereby the ſheriff was commanded quod de terris & catallis ipſius A., &c. levari faciat, and the other called a *fieri facias*, which was only de bonis & catallis, both which writs were to be brought within the year, but afterwards he might bring debt. 3 Rep. 11. Mich. 26 & 27 Eliz. in Scacc. in Sir William Herbert's caſe.

[ 4 ]

20. If *judgment in C. B.* be *affirmed in a writ of error*, the plaintiff may have ca. ſa. or fi. fa. within the year, and ſhall not be put to bring a ſci. fa. 5 Rep. 88. Hill. 40 Eliz. the ſecond reſolution in Garnon's caſe.

Mo. 566. pl. 772. Layton v. Garnonce. S. C. adjudged and reſolved that after the year he ſhall have ſcire facias.——Cro. E. 706. pl. 28. Leighton v. Garnon. S. C. ſaid to be the courſe of the Court.——S. C. cited by Jones J. Godb. 372. that the writ of error was brought within a year of the judgment in C. B. but it was not affirmed in two years after, and yet there he had the ſame proceſs in B. R. as he was to have had in C. B. and that in *Garnon's caſe* the judges delivered their opinions that if after the year and day he brings error, and the judgment is affirmed, he ought to have the like proceſs here as in C. B. and that was a ſcire facias, becauſe the year was paſt in C. B. although it were within the year of the judgment affirmed here.

21. Scire facias was *given in execution by the ſtatute of Weſtminſter* 2. For at common law if the plaintiff had ſucceeded [ſurceaſed] to ſue execution by fieri facias or levari facias a year and a day, he had been driven to his new original. Co. Litt. 290. b. 291. a.

22. A *judgment* being *of eight years ſtanding*, the defendant being taken in execution without notice or ſuing a ſcire facias in the proper county; and therefore it was prayed that he might be diſcharged; but the Court would not; and thereupon he *brought an audita querela, and was boiled* by four mainpernors. 2 Roll. Rep. 42. Trin. 16 Jac. B. R. Mumperſon v. Gates.

23. If *A. recovers a debt as executor of J. S. and makes B. his executor and dies before execution ſued*, *B.* is not put to a new ſuit, but *may have execution* upon that judgment. *But if A. or B. died inteſtate*, now could none as adminiſtrator to either of them, nor as adminiſtrator of J. S. have execution of this judgment. For the former has no intereſt in any thing pertaining to J. S. and the latter comes to title above judgment, viz. as immediate adminiſtrator to J. S. who is now dead inteſtate, and derives no title from the executor who recovered. Went. Off. Executor, 103.

24. It

24. It was moved that *upon a judgment in debt a fieri facias iſſued*, and *more than a year after* the fieri facias the *plaintiff had taken execution by a new fieri facias* without ſuing of ſcire facias, and therefore it was prayed that the monies levied ſhould be ſtayed, and the practice examined, and ſo it was done, and a day given, at which day Herne Secondary certified the Court, that the practice in B. R. is, that after a fieri facias or elegit, &c. taken, if it be not executed, a new fieri facias or elegit may be ſued ſeveral years after without ſuing any ſcire facias, provided that *continuances are entered from the time of the firſt fieri facias*, and thoſe continuances may be entered *after the ſecond fieri facias*, &c. *and a rule be* made upon motion that proceedings ſhall ſtay, and *that nothing ſhall be amended*; quod nota; for by ſuch way, (as Finch Solicitor-general ſaid,) there will be little uſe of ſcire facias. Sid. 59. pl. 28. Mich. 13 Car. 2. B. R. Weldon & al' v. Greg.

25. The common courſe in B. R. is, *after elegit to make* continuances for ſeveral years (if the party pleaſes), and then to take a new elegit without any ſcire facias; per Twiſden and Windham J. Sid. 60. pl. 18. Mich. 13 Car. 2. B. R. in caſe of Welden v. Greg.

If a new fi. fa. be taken out every year one, continuances may be entered at any time

by the attorney in his chamber, otherwiſe not, Arg. to which the Court agreed; and per Wild and Curiam an elegit taken out once may be continued ſeven years; and all the clerks agreed the courſe to be ſo, and by the courſe of C. B. continuances may be entered before the return. Keb. 1 . pl. 110. . . . . v. Welden, S. C. ——12 Mod. 84. Mich. 7 W. 3. Anon. S. P.——Holt Ch. J. took it for a rule that when one writ of fi. fa. is actually taken out, it may be continued on the roll without a ſci. fa. but if there be only an award upon the roll that will not warrant it. Aſton ſaid, that after one writ taken out it might be continued for ſeven years without a ſcire facias, but Sir Samuel Aſtry thought there ſhould be a new writ taken out within every year, and afterwards the Court inclined to that opinion. Comb. 346. Mich. 7 W. 3. B. R. Vincent's caſe.

* Though an elegit be not taken out within a year and a day after the judgment, yet if there are continuances entered on the roll, it may be taken out at any time without ſuing a ſci. fac. Carth. 283. Mich. 5 W. & M. in B. R. Seymour v. Greenvill.

*[5]

26. One that is *not party to the recognizance*, record, &c. *though privy*, ſhall have no writ of execution, though it be within the year, without a ſcire facias. But it is otherwiſe in caſe of a *ſtatute ſtaple* or merchant, &c. for there the proceſs is given by other acts of parliament; per Bridgman Ch. J. in delivering the opinion of the Court. Cart. 193. Paſch. 19 Car. 2. C. B. in the caſe of Law v. Toothill and Rawlins.

27. Execution *on recovery in præcipe quod reddat, or real actions may be ſued after the year without* any ſcire facias, becauſe in ſuch actions the party cannot begin again, as in perſonal actions he may by debt, &c. on the judgment, which the Court agreed, and execution was awarded good. 2 Keb. 307. pl. 6. Hill. 19 & 20 Car. 2. B. R. in caſe of Vicars v. Obrie.

28. A *fi. fa. iſſued* on a judgment, but *before the writ was executed the defendant died inteſtate*; and afterwards *adminiſtration being granted to his wife, the writ was executed upon his goods* in *her hands*, and this was *adjudged good, without bringing a ſci. fa.* becauſe the property of the goods was bound by the teſte of the fi. fa. ſo that a ſale thereof made for a valuable conſideration ſhall be avoided; and ſince the inteſtate himſelf, whilſt living, could

have no plea, why ſhould his adminiſtrator have any time to plead to a ſci. fa.? and of that opinion was all the Court upon advice with the judges of B. R. But this was againſt the opinion of the chief juſtice Vaughan. 1 Mod. 188. pl. 20. Mich. 26 Car. 2. C. B. Farrer v. Brooks.

29. Reſtitution was prayed on an execution made out after the *death of the defendant in the writ of error*, ſuppoſing that the writ was thereby abated, but the Court held that it was not (as in the caſe of the death of the plaintiff in error it would be), but there *muſt be a ſcire facias againſt the executors*. 3 Keb. 571. pl. 3. Hill. 27 Car. 2. B. R. Hart v. Malcher.

30. Upon a *judgment above a year's ſtanding*, you may *have an elegit without a ſcire facias, but not a fieri facias*, for that on the elegit they enter their continuances all along from the judgment; and ſo it was ruled in this caſe. 2 Show. 235. pl. 233. Mich. 34 Car. 2. B. R. Cooke v. Bathurſt.

31. At the common law, if a man had *recovered in debt*, and did not ſue forth execution within a year and a day, he muſt then bring a new original, and the judgment thereon had been a new recovery; but now a *ſcire facias is given by the ſtatute inſtead of an original*; and therefore a judgment thereon ſhall alſo be a new judgment; for though it is a judicial writ yet it is in the nature of an action, becauſe the defendant may plead any matter in bar of the execution upon the firſt judgment, and it is for this reaſon that a releaſe of all actions is a good bar to it. Beſides an action of debt will lie upon a judgment on a ſcire facias, which ſhews that *it is an action diſtinct from the original*, and upon ſuch a judgment the defendant may be committed to priſon ſeveral years afterwards without a new ſcire facias; Arg. 3 Mod. 189. Hill. 3 Jac. 2. B. R. in caſe of Obrian v. Ram.

32. Scire facias *againſt an executor* upon a judgment in ejectment againſt his teſtator is not good unleſs it ſets forth or *names the executor terretenant of the land recovered*, and it ſhall not be intended; becauſe a defendant in ejectment is always ſuppoſed a diſſeiſor, and that by his death the lands deſcend to his heir, and ſo plaintiff cannot have judgment for the poſſeſſion or damages; becauſe the *writ not being good for part is bad for the whole*; and the Court inclined to this opinion. Carth. 2. Trin. 3 Jac. 2. B. R. Doyley v. Walker.

[ 6 ]

33. *At the common law* before the ſtatute of W. 2. *if execution had not been ſued upon a judgment in any perſonal action within a year and a day*, the *party muſt then have brought* an action of *debt upon that judgment*; for he could have no ſcire facias upon that judgment, but now that ſtatute applies a proper remedy by giving the ſcire facias upon the judgment; per Cur. 4 Mod. 248. Mich. 5 W & M. in B. R. in caſe of Dighton v. Granvil.

34. Execution *on a judgment in ejectment* was denied to be granted after the year without a ſcire facias; and the caſe of * Sid. 351. being cited, Holt Ch. J. ſaid that that caſe was not fully

* This was the caſe of Okey v. Vicars.—

fully reported. Comb. 250. Paſch. 6 W. & M. in B. R. † Barwick v. Fenwood. 2 Keb. 307. pl. 6. S. C. ——S. C.

cited Arg. 7 Mod. 64, 65. † Skinn. 427. Marwood v. Fenwick. S C. The ſtatute of Weſtm. 2. extends only to perſonal actions, whereas an *ejectment* is a mixed action, and in the reality as to the recovery of the land, and therefore left the party to take execution as he ſhould be adviſed; per Holt Ch. J. and he did not agree clearly with Siderfin in this caſe.

*After a year after judgment* in ejectment an habere facias poſſeſſionem cannot iſſue without a ſcire facias to revive the judgment. 2 Ld. Raym. Rep. 806. Mich. 1 Ann. Withers v. Harris.

35. *Judgment* in treſpaſs *againſt four, who bring error; one dies;* the plaintiff cannot ſue execution without *ſuggeſting the death upon record*, but need not ſue ſcire facias. 1 Salk. 319. pl. 3. Trin. 9 W. 3. B. R. Pennoir v. Brace. He cannot ſue out execution till the Court is informed of

the abatement of the writ of error by the death of one of the plaintiffs in error before the return of the writ; for in ſtrictneſs it ought to be ſuggeſted on record, and the Court ought to adjudge the writ abated, &c. and for want thereof reſtitution was awarded. Carth. 404. S. C. ——A ſuggeſtion ought to be made on the roll, and then to pray execution againſt the ſurvivors, et quia ſuper examinationem conſtat curiæ that one of the defendants was dead, therefore the Court doth award execution againſt the reſt; and for this reaſon a ſuperſedeas was awarded quia improvide. ——5 Mod. 338. Brace v. Pennoyer. S. C. ——Comb. 441. S. C. & S. P. and a ſuperſedeas granted to the execution quia improvide, &c. ——12 Mod. 130. Bennoyer v. Brace. S. C. & S. P. ruled accordingly. ——Ld. Raym. Rep. 144. S. C. & S. P. accordingly. ——8 Mod. 108. cites S. C. held accordingly.

36. If *judgment* be had *againſt two defendants* and *one dies*, execution may be had againſt the *ſurvivor* without ſcire facias, which we hold it may, ſuppoſing it to be within the year; becauſe there is no change of record at all; and it ſhall not be intended there was a releaſe to the party deceaſed. 12 Mod. 130. Trin. 9 W. 3. Bennoyer v. Brace.

37. Where any *new perſon* is either to be better or worſe by the execution there muſt be a ſcire facias, becauſe he is a ſtranger, to make him party to the judgment, otherwiſe where the execution is neither to charge or benefit any new party as in caſe of *ſurvivorſhip*. 1 Salk. 320. pl. 3. Trin. 9 W. 3. B. R. Pennoire v. Brace. Ld. Raym. Rep. 245. S. C. & S. P. Arg. and admitted by Holt Ch. J.

38. A *capias* or *fi. fa.* being in the perſonalty may ſurvive, and may be ſued againſt the ſurvivors without a ſci. fa. otherwiſe of an *elegit*, for there the heir is to be contributory. Per Holt Ch. J. 1 Salk 320. pl. 3. Trin. 9 W. 3. B. R. in the caſe of Pennoire v. Brace.

39. If one will *take out execution within a year after judgment* he may *continue it down* after the year *by vicecomes non miſit breve* without being put to a ſcire facias; per Holt Ch. J. 7 Mod. 50. Mich. 1 Ann. B. R. Withers v. Harris.

40. In *ejectment* execution cannot be ſued after the year and day without ſcire facias, and may be brought either by the plaintiff or his leſſor. 1 Salk 258. pl. 11. Mich. 1 Ann. B. R. Withers v. Harris. 7 Mod. 64. S. C. held accordingly that it cannot be without a ſci. fa.

though it is ſtated there that the judgment was upon terms that there ſhould not be execution till ſuch time, which was a year and half after.

41. In no caſe where the *parties to the judgment are changed*, ought execution to be ſued by any other without a ſcire facias. 2 Ld. Raym. 768. Trin. 1 Annæ. The Queen v. Ford. [7]

6 Mod. 288. S. C. — In such a case a writ might have been taken out and continued by a *vice comes non misit breve*. Ibid. — So of a writ of error if the judgment be affirmed after a year after the first judgment. Cro. E. 416. pl. 10. Mich. 37 & 38 Eliz. B. R. Goodwin v. Grudge.

42. Where execution is ſtayed by *injunction* till after the year the plaintiff muſt ſue a ſcire facias. 1 Salk. 322. pl. 9. Mich. 3 Ann. B. R. Booth v. Booth.

## (N. a. 2) Scire Facias.

### On what Judgment it lies.

1. IF a *prior recovers land by default, and has quale jus, and* pending this *dies*, the *ſucceſſor* ſhall not have quale jus without ſuing ſcire facias; for it may be that the tenant has got a releaſe after; per Thorp and Mowbray J. quod nota. Br. Scire Facias, pl. 210. cites 44 E. 3. 41.

2. *At the common law*, if a man had *recovered debt or damages*, and had not taken execution within the year, he *had been put to the new original of debt*, but now by the ſtatute of Weſtminſter 2. cap. 45. quia de hiis recordata ſunt, &c. he ſhall have ſcire facias, but *yet he may have debt as at common law*; for the ſtatute does not prohibit it; per Wangford. Br. Scire Facias, pl. 146. cites 36 H. 6. 3.

3. An *elegit upon a judgment iſſued at the ſuit of H.* and after *H. died*, and his *eldeſt ſon ſued a ſcire facias* upon the ſaid judgment; and holden that *it lies not*. Lane, 16. Hill. 4 Jac. in the Exchequer, Huddleſton and Hill v. Bows.

Keb. 810. pl. 83. S. C. adjornatur.

4. On a motion for a ſcire facias *to avoid a judgment made void by the ſtatute* 12 *Car.* 2. *of general pardon* (the judgment being obtained before 1658 for matters relating to the war) the Court doubted whether a ſcire fa. lay, or whether the party ought to bring audita querela, and therefore took time to adviſe. Sid. 231. pl. 32. Mich. 16 Car. 2. B. R. Allen v. Powell.

2 Keb. 143. pl. 19. S. C. and a ſcire facias was awarded per totam Curiam. — S. C. cited 2 Lutw. 1268.

5. *Leſſee* was *plaintiff in ejectment and got a judgment*, and *his adminiſtrator brought a ſci. fa.* againſt the tertenants to ſhew cauſe quare executionem non haberet; the tertenants demurred to this ſci. fa. for that there is no precedent for a ſci. fa. upon ſuch a judgment; but it was agreed, that the ſcire facias was *well brought*. Sid. 317. pl. 5. Hill. 18 & 19 Car. 2. B. R. Cole v. Tertenants of Skinner.

## (O. a) In what Caſes there ought to be a Scire Facias.

### [*After the Year.*]

[1. IF a man acknowledges a *recognizance to be paid at a certain day beyond a year of the date* of the recognizance, the year being paſt from the date of the recognizance, though it be *within the year after the day of payment*, yet he ſhall not have execution without a ſcire facias. 21 E. 3. 22. b. adjudged.]

[2. If a man acknowledges a recognizance to be paid at a day *within the year* after the date of the recognizance, in this caſe he may have execution by fieri facias, or elegit, within the year after the day of payment, though * the year be paſt from the date of the recognizance. 21 E. 3. 22. b.]

* Fol. 900.

[3. If a man *recovers an annuity*, he ſhall have execution for *every term that incurs afterwards* by fieri facias or elegit *within the year* after the term incurred, though the year be paſt from the judgment. 21 E. 3. 22. 1 E. 3. 3. But *not after without ſcire facias*. 21 E. 3. 22. 1 E. 3. 3.]

In ſcire facias the *plaintiff recovered annuity againſt a parſon*, and the *arrearages were arrear for 2 years*, and the *parſon died*, and the *plaintiff prayed execution againſt the ſucceſſor, viz. ſci. fa. againſt the ſucceſſor of the firſt, and fi. fa. de bonis eccleſiaſt' of the laſt year*, becauſe it is within the year, viz. fi. fa. epiſcopo dirigend' de bonis eccleſiaſt', and *the judgment was by nient dedire*, by which he *ſhall have ſci. fa. of all*; but *if the predeceſſor had had aid*, the *plaintiff ſhall have his prayer*. Br. Executions, pl. 56. cites 24 E. 3. 23.——Br. Scire Facias, pl. 117. cites S. C.——Br. Scire Facias, pl. 212. cites S. C.

[4. If a man be bound in a *recognizance* to the king upon condition to be *of good behaviour*, &c. he cannot be *indicted for breach* of the good behaviour, by which he forfeited the recognizance without a ſcire facias. Mich. 15 Car. B. R. PERROWE'S CASE, per Cur. and ſuch indictment taken in Cornwall quaſhed accordingly, and ſo two other indictments the ſame term quaſhed, the one againſt SMITH, the other againſt BAYNARD; for if a ſcire facias had been brought, they might have pleaded any thing to diſcharge them.]

5. In account the *defendant was awarded to account*, and *capias ad computand'* awarded againſt him, and *came into court by another ſuit*, and the *plaintiff prayed that he might remain* for his execution, and becauſe it was after the year and day he was put to the writ of ſcire facias; quod nota. Br. Scire Facias, pl. 94. cites 21 E. 3. 7.

6. In *fi. fa. of damages recovered*, and *this proceſs was continued by return of the ſheriff till the year was paſſed*, which ſeems to be *by alias*, fi. fa. *and pluries*, and after the year the ſheriff returned that the defendant has not any goods but 41. by which the plaintiff prayed elegit in divers counties, and had it. Br. Execution, pl. 128. cites 47 E. 3. 26.

Br. Elegit, pl. 5. cites S. C.

7. In

7. In covenant *rent was granted by fine*, and the *conuſee brought writ of covenant to have execution of arrearages* of the ſame rent, *where he may have writ of ſcire facias*; and by the opinion of the Court he may have writ of covenant if he will, and ſo writ of covenant upon writ of covenant. Br. Execution, pl. 106. cites 22 E. 4. 1, 2.

8. *So* of him who recovers *in debt or treſpaſs, he may have writ of execution, or new original, at his pleaſure*, as here. Ibid.

3 Le. 259. pl. 345. S. C. in totidem verbis.— 4 Le. 44. pl. 110. S. C. in totidem verbis.

9. If one has ſued forth a *writ* of execution, and that is *continued by vicecomes non miſit breve for* 2 *or* 3 *years*, yet the plaintiff may proceed thereupon, and ſhall not be put to a ſcire facias; *but if* ſuch * writ be ſued forth, and not continued, but *diſcontinued by a year and a day*, he ſhall be put to a ſcire facias, for it is negligence of the plaintiff of not continuing of it, which within the year and day he might without order of the Court, but after the year not by any order of the Court, &c. per Manwood. 2 Le. 78. pl. 101. Trin. 31 Eliz. in the Exchequer, Sir Wm. Waller's caſe.

* [9]

10. *Judgment for* 600*l.* the creditor *acknowledged ſatisfaction for* 400*l. of the debt, and* 10*l. for damages*, and afterwards an *agreement was made* between them, *that if he did not pay the money by ſuch a day, that it ſhould be lawful to take out execution, without bringing a ſci. fa. though it was after the year.* The money was not paid. The creditor took out execution, and the debtor being brought to the bar by habeas corpus, prayed a ſuperſedeas, becauſe the writ erronice emanavit. The Court held this a cauſe to diſcharge him of the execution, for that the capias ought to have iſſued for two hundred pounds only, and that notwithſtanding the agreement, the creditor ought to have brought a ſcire facias, becauſe the proceſs was not continued, but it was diſcretionary in the Court, whether to grant a ſuperſedeas or not; for they may put the defendant to his writ of error. Win. 100. Mich. 22 Jac. C. B. Hickman v. Sir William Fiſh.

11. A *judgment* was recovered by *teſtator*, and *he took forth a levari facias*, whereupon the *ſheriff returned that he had no lands nor goods.* Teſtator died, and his *executors, without ſuing forth any ſcire fac.* on the ſaid judgment, *took forth execution*, and took the defendant in execution; but upon his applying to the Chancery, the Court referred it to the judges for their opinion, and purſuant thereunto granted a *ſuperſedeas* to diſcharge him. Chan. Rep. 90. 10 Car. 1. Caldwell v. Wheat.

12. *In caſe of the king*, there need not be any ſcire facias after the year. 2 Salk. 603. pl. 14. Paſch. 5 Ann. B. R. Anon.

Ibid. in a note of the reporter, a quære is added, whether in this caſe the plaintiff H. could not have taken out execution, and continued it by vicecomes non miſit breve agreeably to what was ſaid by the court of B. R. in the caſe of Booth v. Booth. Salk. 322. —— 1 Salk. 322. pl. 9. Mich. 3 Ann. B. R. the S. C.

13. The *plaintiff gets judgment* in the petty bag, after which *he is ſtopped* 2 *or* 3 *years by an injunction*, ſo that the year and day paſs; the plaintiff, though hindered by the injunction, yet cannot ſue out execution without a ſcire facias. 3 Wms.'s Rep. 36. Hill. Vac. 1729. Hodſon v. Earl of Warrington.

## (P. a) In what Caſes without Scire Facias.

[1. IF a man *recovers damages or debt againſt B.* and after *B. dies*, no execution lies *againſt the executor* without a ſcire facias. 18 E. 2. Execution, 243. Adjudged 15 H. 6. b.]

Where the parties to a judgment or conviction are changed, execution ought not to be ſued without a ſcire facias. 2 Raym. 768. Paſch. 1 Ann. The Queen v. Ford & al'.

[2. If a *man recovers* debt or damages by judgment, *and dies before execution*, his *executor* ſhall not have execution by fieri facias or capias, though it be within the year, but ought to have a ſcire facias. 15 H. 7. 16. b.]

Br. Execution, pl. 64. cites 15 H. 7. 14, 15. S. C. —— Br. Scire Facias, pl. 123. cites 15 H. 7. 15, 16. S. C. ——*Contra upon ſtatute ſtaple or merchant.* Ibid. —— * Br. Scire Facias, pl. 123. cites 15 H. 7. 15, 16. S. C. ——*So* if the *defendant dies*, the *plaintiff ſhall not have execution by fi. fa. againſt the executor*, but ſhall have ſci. fa. firſt. Ibid. ——Br. Scire Facias, pl. 123. cites 15 H. 7. 15, 16. S. C.

*[ 10 ]

3. *Debt* lies of execution *of damages recovered in* writ of *waſte or action real*; for the *damages are perſonal*, and a man may chooſe to have *fieri facias*, *elegit*, *or* writ of *debt*; quod nota by award. Br. Executions, pl. 17. cites 43 E. 3. 2.

4. *Execution by default was awarded in ſci. fa. on a judgment in debt*, and about 4 *years afterwards the defendant was a priſoner in the Fleet for another cauſe*, and being brought to the bar by habeas corpus, he was examined, whether he was the ſame perſon who was condemned ut ſupra, and he confeſſed he was; whereupon he was remanded to the Fleet, there to remain quoſque, &c. and this after the year and day without a new ſci. fa. D. 214. b. pl. 47. Trin. 4 Eliz. Anon.

S. C. cited Arg. 3 Mod. 189. in caſe of Obrian v. Ram, and ſays that upon a judgment in a ſci. fa. the defendant may be committed to priſon ſeveral years afterwards without a new ſcire facias. ——And where one recovered upon a recognizance, and afterwards brought debt upon the ſame recovery, it was adjudged maintainable, notwithſtanding it was objected, that the judgment in ſuch ſcire facias is not to recover debt, but to have execution of the judgment. 4 Le. 186. pl. 287. Mich. 17 & 18 Eliz. B. R. Barnard v. Tuſſer.

5. *Three women and the baron of one* of them *recovered in debt* in C. B. and *upon error brought* in B. R. *that judgment was affirmed*; then the *baron died*, and the women brought a capias ad ſatisfaciend' againſt the defendant without a ſci. fa. and adjudged good. Mo. 367. pl. 503. Mich. 36 & 37 Eliz. Iſham's caſe.

In this caſe it was moved to be erroneous, becauſe if two recover, and one of them dies, there muſt be a ſci fa. againſt the defendant before execution ſhall iſſue, becauſe he may have a releaſe of him that is dead to plead; quod fuit conceſſum; but it is not ſo in a writ of error, becauſe he might have pleaded it before upon the writ of error, and thoſe for whom the error is affirmed ſhall ſue execution. Ibid.

If two recover in debt, &c. and before execution one of them dies, if execution be ſued in both their names it is not error. Brownlowe ſaid, that in ſuch a caſe the ſurvivor ought to ſue a ſcire facias before that he can ſue execution; but Cook and all the Court ſaid, that he may ſue execution without a ſci. fa. becauſe he is privy and party to the judgment, and vouched 21 Ed. 3. Noy, 150. Anon.

6. *Where a judgment in debt is affirmed in a writ of error*, the defendant in the writ of error ſhall have *execution immediately without*

*out a ſcire facias, though the year and day be paſt* ſince the firſt judgment; per all the juſtices, and ſo the clerks ſaid their uſage was. Cro. E. 416. pl. 10. Mich. 37 & 38 Eliz. B. R. Goodwin v. Grudge.

7. After a *judgment in an information* on the ſtatute of 35 H. 8. cap. 17. for not leaving ſtandils in wood, the *informer died*, and his *adminiſtrator ſurmiſed it on the roll*, and prayed his moiety, and had it; and it was ſaid the courſe in C. B. was ſo. Hardr. 161. pl. 2. in Scaccario, Mich. 1659. Morby v. Urlin.

8. If there be *two plaintiffs in a perſonal action*, and *one of them dies*, that ſhall not put the other to a ſcire facias, *or if one of the defendants dies*; therefore likewiſe a ſcire facias is not neceſſary, becauſe *the ſame party ſtill remains on record*, and this has been lately adjudged upon ſolemn debate here; per Holt Ch. J. 7 Mod. 68. Mich. 1 Ann. B. R. in caſe of Withers v. Harris.

[ 11 ] (P. a. 2) Where a Scire Facias muſt be, or a new Action.

1. IN *account*; the *defendant is awarded to account*, and after the *plaintiff died*, and the *executor of the plaintiff brought ſcire facias*, and it was abated by award, and there is no remedy but new original; for this record is not determined till he has accounted in fact. Br. Execution, pl. 114. cites 21 E. 3. 32.

2. An *adminiſtrator being ſued for debt pleaded plene adminiſtravit*, and the *jury found aſſets to ſatisfy part*, whereupon the *plaintiff had judgment for ſo much, and that the defendant for the reſidue eat inde ſine die.* The *plaintiff now ſuggeſted aſſets to the value of the reſidue* come to the hands of the adminiſtrator, and thereupon ſued a ſci. fa. but the opinion of the Court was, that it did not lie, notwithſtanding 4 H. 6. and 33 H. 6. were vouched; but Anderſon ſaid, that the judgment does not warrant the ſci. fac. but a new writ of debt. Mo. 246. pl. 386. Mich. 29 Eliz. Anon.

Lat. 140. S. C. in totidemverbis. —Noy, 81. Paſchal v. Warren, S. C. held accordingly.

3. The *obligee died inteſtate*, and his *adminiſtrator brought debt on the bond, and had judgment, and* then he *died inteſtate, and his adminiſtrator brought ſci. fa.* upon that judgment, *and upon two nihils returned had judgment and execution upon it.* On a motion that the adminiſtrator ſhould not have the monies levied, the Court ſaid it was too late after judgment on the ſci. fac. to remedy this by motion, but he is put to his writ of error; and ſo *day was given to ſhew cauſe* why the plaintiff ſhould not have his money. Palm. 443. Trin. 2 Car. B. R. Paſchall v. Ware.

## (Q. a) Where after Scire Facias.

[1. *AFTER a judgment*, if the plaintiff *within the year ſues a ſcire facias, he cannot have a capias after within the year* till he has a new judgment in the ſcire facias. Trin. 13 Car. B. R. per Cur. between ROBERTS AND PISING.]

2. A man brought *ſcire facias againſt J. N.* of land, and *execution was awarded to him by default*, and after the *plaintiff* came and *ſaid, that J. N. is not tenant, but W. S. is tenant, and prayed ſci. fa. againſt him*; per Thorp, this you cannot have; for it may be that execution is made. Per Cand. this is no miſchief; by which the * writ was granted to him; quod nota; and ſo ſee ſcire facias after ſcire facias. Br. Execution, pl. 122. cites 39 E. 3. 15.

* S. P. for if execution was made before, the tenant may plead it; quod nota, Br. Scire Facias, pl. 136. cites S. C.

3. If a man *recovers land* and has execution, he never ſhall have execution again upon ſuch recovery; *but* if a man recovers in writ of *annuity* or *rent*, *or upon compoſition to repair my mills quando neceſſe fuerit*, of ſuch *things which ſhall be done or paid very often*, he ſhall always have ſcire facias from time to time, for the thing is always executory. Br. Scire Facias, pl. 218. (bis) cites 2 H. 6. 9.

[ 12 ]

4. After ſci. fa. upon a recovery *in debt* a man may have *ca. ſa.* againſt one who is not executor, &c. Br. Execution, pl. 12. cites 34 H. 6. 45.

Br. Exigent, pl. 11. cites S. C. becauſe in debt the capias is the proceſs.

5. And concordat optima opinio 48 E. 3. 8. and 14. for capias lies by reaſon that the original is by writ of debt; but it is agreed there that capias does † *not* lie *upon judgment in ſci. fa. upon recognizance*; quod nota. Contra in ſci. fa. upon debt. Ibid.

† Br. Exigent, pl. 11. cites S. C.

6. Scire facias of execution *in C. B.* it was agreed, that if the *ſheriff returns nihil* an *alias ſhall iſſue*, and thereupon *another nihil* returned *execution ſhall be awarded*; but *in B. R.* execution ſhall be awarded upon the firſt nihil returned; quod nota; quære cauſam. Br. Scire Facias, pl. 121. cites 14 H. 7. 19.

7. *H. recovered a judgment* anno 17 Car. 2. againſt the defendant, *and had a teſtatum ſci. fa. to the tertenants*, who appeared and pleaded, and there was a *verdict againſt them, and judgment thereupon.* Afterwards *H. became a bankrupt*, and *the commiſſioners aſſigned the original judgment to P.* who now moved the Court that it might be entered to entitle him to the benefit of the judgment upon the ſci. fa. which was ruled accordingly, without bringing a new ſci. fa. Quod nota. 5 Mod. 18. Mich. 7 W. 3. Plummer v. Lea.

## (Q. a. 2) By Fieri Facias.

1. IF a *fi. fa. for* 20 l. is awarded to the *ſheriff*, upon which he *takes an intire chattel and ſells it for* 40 l. and returns the fi. fa. with the 20 l. into court, *he may detain the ſurpluſage till the defendant comes to demand it* of him; for he is not bound to ſearch for the defendant; per Popham, and agreed. Noy, 59. 38 Eliz. Wooddye v. Coles.

2. *But if* a fi. fa. is awarded *for* 40 s. by force of which the *ſheriff takes five oxen, every one of the value of* 5 l. *and ſells them all*, it is clear that the defendant ſhall have action of *treſpaſs againſt the ſheriff*; per Gawdy; which was agreed. Noy, 59. in caſe of Wooddye v. Coles.

3. On a fi. fa. ſheriff may not *break the outer door* of the houſe and enter; but if that be open he may enter, and then may and ought to break the *door of an entry* or *chamber* which is locked, and break open any *cheſt* and take the goods in it in execution, and if he does it is not an action on the caſe lies againſt him. Brownl. 50. Trin. 44 Eliz. Anon.

4. This writ though mentioned in the ſtatute *W.* 2. 18. is a writ of execution *at common law*, and is called a fieri facias, becauſe the words of the writ directed to the ſheriff are *quod fieri faciat de bonis & catallis, &c.* and from theſe words the writ takes its denomination. Co. Litt. 290. b.

5. The property till ſale remains in defendant. Brownl. 41. Trin. 6 Jac. Anon.

When a judgment is once executed the goods are in cuſtodia legis, and neither Exchequer proceſs or aſſignment per commiſſioners of bankrupts will touch them. 3 Mod. 236. Trin. 4 Jac. 2. B. R. Letchmere v. Throwgood.

6. The *property of goods* is veſted by the delivery of the fi. fa. and an *extent afterwards* for the king comes too late, and that on the ſtatute of frauds and perjuries, per Holt. Cumb. 123. Trin. 1 W. & M. in B. R. Lechmere v. Thoroughgood.

[ 13 ]

7. The *king grants* an *annuity* for 40 years to B. to be received by the hands of the receiver of the Court of Wards. This is a rent-charge, and may be ſold by the ſheriff upon a fi. fa. of the goods of B. It is *otherwiſe* of an annuity for years *granted by a common perſon*. Reſolved in the Court of Wards by the two Ch. Juſtices and Ch. Baron. Jenk. 312. pl. 97. 3 Jac. Mary York's caſe.

8. *Debt againſt the ſheriff* lies for money levied on a fi. fa. before the *return of the writ*, elſe he might take advantage of his own wrong. 2 Show. 79. pl. 63. Trin. 31 Car. 2. B. R. Cockram v. Welby.

S. C. cited 2 Salk. 508. —2 Jo. Taller v. Baker. S.C.

9. *Payment to the ſheriff* on a fi. fa. is a good plea, but not ſo to the gaoler. 2 Lev. 203. Trin. 29 Car. 2. B. R. Taylor v. Bekon.

the Court held the plea not good, and that the caſe differs much from the caſe of payment to the ſheriff upon a fieri facias. For he is commanded to levy the debt of the goods of the defendant by the writ of the king, but no ſuch authority is given to the marſhall; and judgment for the plaintiff. ——— 2 Mod. 214. S. C.

214. S. C. Jones and Rainsford held that the payment to the marſhall was no diſcharge; but Wild J. was of another opinion. The report ſays, quære.

Upon a fieri facias, if the ſheriff returns fieri feci, and the money paid to the plaintiff, it is good; quære. Cumb. 242. 2 Show. 87. S. P. adjudged. The King v. Bird.

10. If the ſheriff on a fi. fa. do *ſell a leaſe* or term of a houſe, he cannot and muſt not *put the perſon out of poſſeſſion* and the vendee in, but the vendee muſt bring his ejectment; per Cur. 2 Show. 85. pl. 74. Hill. 31 & 32 Car. 2. B. R. The King v. Dean and Bird, & al.

11. When the officers are once in the houſe on a fi. fa. they may *break open* any chamber doors or trunks for doing their execution. Agreed per Cur. 2 Show. 87. pl. 78. Hill. 31 & 32 Car. 2. B. R. The King v. Bird.

12. *Goods of the wife veſted in truſtees on the marriage*, but the huſband to have the uſe of them for his life, were ſeized on an execution for the debt of the huſband, and the aſſignment adjudged fraudulent as to the creditors at law, and no relief to be given in equity. 2 Vern. 238. pl. 221. Mich. 1691. Underwood v. Mordant.

13. Upon a fi. fa. the ſheriff may *take* any thing but *wearing clothes*; if the party has two gowns, he may take one of them. Per Holt Ch. J. Cumb. 356. Hill. 8 W. 3. B. R. Hardiſty v. Barny. 2 Salk. 598. pl. 3. S. C. but S. P. does not appear.

14. *Two* fieri facias's were *delivered the ſame day*. Holt Ch. J. inclined that the ſheriff had election to prefer either, but ordered it to be made a caſe. Sed quære now the late ſtatute. Cumb. 428. Trin. 9 W. 3. B. R. Smalcorn v. Sheriff of London. S.C. Cumb. 452. but no reſolution. —S.P. execution of the laſt firſt is good, but the plaintiff in the firſt may have action againſt the ſheriff, unleſs he bid the ſheriff ſtay execution, or to that purpoſe. 1 Salk. 320. Smallcomb v. Buckingham.——In 1 Salk. is a N. B. that he who brought the firſt writ told the ſheriff that he was not in haſte, and ſo took out no warrant, nor left any fee, and this inclined the opinion of the Court more ſtrongly againſt him.——Carth. 419. S. C. and after ſeveral debates the judges were of opinion for the plaintiff who had taken out his execution laſt, to which they rather inclined, for that it appeared that the other creditor did not demand an execution of his writ. And by Holt Ch. J. the vendee of the goods in ſuch caſe has good title to them, which cannot be defeated by a ſubſequent execution of that writ which was firſt delivered; but the party concerned in ſuch writ is put to his action againſt the ſheriff; for otherwiſe it would be dangerous to make ſuch purchaſes of ſheriffs, and that might make writs of execution of no effort.——5 Mod. 376. S. C. Holt Ch. J. took notice that the party ſaid to the ſheriff, "You may let "it lie, it requires no haſte," and therefore deſires no warrant, nor leaves any fee, and ſo the ſale upon the ſecond fi. fa. good, and not to be avoided. And though the ſecond fi. fac. had been delivered a fortnight after, yet if it be the firſt executed it ſhall be good, and the party's remedy is only againſt the ſheriff.——12 Mod. 146. S. C. held accordingly.——Ld. Raym. Rep. 251. S. C. reſolved accordingly.——Comyns's Rep. 35. S. C. adjudged accordingly.

15. A. is in execution at ſuit of B. and *charged with action* at ſuit of C. who obtains judgment; he ought to charge in execution by *commititur* and *not by ca. ſa.* but he may have fi. fa. But quære, if after he has charged him by commititur, he may have fi. fa. he continuing ſo in execution? By the ſtatute, if one in execution by ca. ſa. eſcape, plaintiff may ſue fi. fa. 12 Mod. 313. Mich. 11 W. 3. [ 14 ]

16. If *ſheriff levies* money on a fieri facias *and returns fieri feci*, an action of debt will lie againſt him. 12 Mod. 604. Mich. 13 W. 3. Cole v. Acorn.

17. In

17. In caſe of a fi. fa. againſt a *leſſee for years without impeachment of waſte*, the ſheriff cannot cut down and ſell ſome things which the tenant may, becauſe in that caſe the tenant has only a bare power without an intereſt; but where he has an intereſt as well as power, as tenant for years has in *ſtanding corn*, the ſheriff may cut down and ſell. Per Holt Ch. J. 1 Salk. 368. Mich. 2 Ann. Pool's caſe at niſi prius in Middleſex.

See tit. Court (of hundred) (G. a), pl. 12. and the notes there.

## (Q. a. 3) By Levari Facias.

1. UPON a levari facias out of a *court baron goods* cannot be *ſold* without a cuſtom to authorize it. Brownl. 41. Trin. 6 Jac. Anon.

2. At *common law* a common perſon debtee might have had a levari facias for the recovery of his debt, by which the ſheriff was commanded, quod de terris & catallis ipſius the debtor, &c. levari faciat, &c. But in ſuch caſe *the debtee did not meddle with the land, but the ſheriff collected the debt and paid it over* to the debtor. Per Doderidge J. Godb. 290. pl. 216. Paſch. 21 Jac. in the Court of Wards in Sir Edward Coke's caſe.

3. Though one be in execution for the *king*, yet a levari facias lies de bonis & catallis, and by ſuch writ the ſheriff may *take ready money*. 2 Show. 166. pl. 157. Mich. 33 Car. 2. B. R. The King v. Webb.

## (Q. a. 4) By Habere Facias Poſſeſſionem, &c.

1. UPON *a fine of* grant of *rent the conuſee prayed writ to put him in ſeiſin, and had it*; quod nota, an habere facias ſeiſinam upon a fine executory, as well as upon a recovery; contra upon a fine executed. Br. Seiſin, pl. 10. cites 21 E. 3.

2. Sheriff returns a *reſcous* upon an hab. fac. poſſeſſionem, it is not good; Arg. Roll. Rep. 440. cites 6 H. 7. 12.

3. If one brings *ejectment of* 20 *acres* of land, and defendant pleads not guilty, and is found *guilty for* 10, and for the remainder not guilty, the *plaintiff ſhall ſhew the land*, and be put in poſſeſſion at his peril, and ſo in action real; per Manwood Ch. B. and ſaid it was the opinion of the Ch. Juſtices in the Star-Chamber. Savil. 28. pl. 67. Trin. 24 Eliz. in the caſe of the Queen v. Ayleworth.

4. A precept cannot be made and awarded *out of the court of a manor* to execute a recovery by plaint in nature of a writ of right there, and to put the recoveror in poſſeſſion with the *poſſe manerii*; for force in ſuch caſes is not juſtifiable, but by command out of the king's courts. 3 Le. 99. pl. 142. Mich. 26 Eliz. C. B. Anon.

[ 15 ]

5. Upon an habere fac. ſeiſinam the ſheriff *as to one acre returned habere feci, and as to the other tarde;* per omnes juſticarios, præter Periam J. the ſheriff ought to be amerced for ſuch return contrary and repugnant in itſelf; but per Periam, it may be that the acre of which no ſeiſin is had was ſo far diſtant from the other that the ſheriff for want of time could not make execution of both; but it was anſwered, that then he might make execution in one in the name of both. 2 Le. 175. pl. 214. Mich. 30 Eliz. C. B. Anon. 4 Le. 57. S. C. & S. P. Anon.

6. After judgment given in a *real action* the plaintiff *within the year and day* may have an hab. fac. ſeiſinam. Co. Litt. 254. b.

7. If habere fac. poſſ. goes to the ſheriff, and he *returns* that he has made *execution* of this writ, and the *return is filed*, there the Court can never award *a new hab. fac.* becauſe it appeared on the record that the party once had execution of the judgment; but *before the filing the writ and return*, the Court may award a *new hab. fac.* So if the *day of return paſs*, and *no return* made, there on a vicecomes non miſit breve may award a new hab. fac. but *before the day of return* cannot award it, becauſe it ought to appear by the return of the ſheriff at the day what has been done upon the writ. Palm. 289. Trin. 20 Jac. B. R. Molineux v. Fulgam. Cumb. 150. 1 Salk. 321. Kingſdale v. Man.—2 Brownl. 253. Noy, 121. Anon.

8. If *ſheriff give poſſeſſion* to the party, and the other *ejects him preſently*, the ſheriff may reſtore him to the poſſeſſion notwithſtanding his former execution, becauſe he ought to leave him in a peaceable and quiet poſſeſſion. Palm. 289. Trin. 20 Jac. B. R. Molineux v. Fulgam. So if in a ſhort time after defendant turns plaintiff out of poſſeſſion, 6 Mod. 27.

it is a diſturbance, and an attachment will go.

9. *Driving the party's cattle off the land* after poſſeſſion delivered on an hab. fac. poſſ. ſeems to be putting out of poſſeſſion, for which an *attachment* will lie, but for only diſturbing him in his poſſeſſion it ſeems an attachment will not lie. Sty. 277. Trin. 1651. Smith v. Earl of Dorſet.

10. Hab. fac. poſſeſſ. ſhall *not be granted after a year* after the judgment *without motion* in court, and if it be once executed, though the parties are *turned out immedictely by a trick*, they cannot have a new hab. fac. poſſ. without motion of the court. Sid. 224. pl. 15. Mich. 16 Car. 2. B. R. Anon in a nota.

11. A *ſheriff* was ordered to attend the Court for demanding an exceſſive *fee* for the execution of an habere fac. poſſ. the Court ſaying there was none due. Vent. 351. Mich. 32 Car. 2. B. R. Anon. in a nota. On a motion that an under ſheriff might attend for refuſing to

execute a fire facias till his ſhilling-pence was paid, the Court would not grant the rule, but ſaid it was extortion, for which he might be indicted. Salk. 321. pl. 5. Hill. 7 W. 3. B. R. Anon.

12. If a man be put into poſſeſſion by virtue of this writ, and after be *diſturbed* by violence, an *attachment* may be granted, for it is a contempt to this Court; and becauſe the juſtices of peace would not relieve the party, they were ordered to attend the Court. Cumb. 150. Mich. 1 W. & M. in B. R. Dogget v. Roe. 2 Brownl. 253.—6 Mod. 27.

13. Upon an habere fac. poſſeſſionem, the *execution is not complete till* the bailiff delivers the poſſeſſion and is gone; per Holt Ch. J. 6 Mod. 115. Hill. 2 Ann. B. R. Anon.

[16] (Q a. 5) Habere Facias Seiſinam or Poſſeſſionem, &c. How, and neceſſary; in what Caſes.

1. THERE needs *no return* of an hab. fac. ſeiſinam upon a judgment in a *writ of partition*, for the party that recovers may execute his judgment by his *entry*. Noy, 71. Counteſs of Warwick v. Lord Berkley, cites D. 76. a. [Mich. 6 E. 6.]

2. Where the *demand is certain*, the recoveror may enter *without any writ* of hab. fac. ſeiſinam; per Coke Ch. J. Roll. Rep. 213. Trin. 13 Jac. B. R.

3. Judgment in ejectment, and an habere facias poſſeſſionem awarded, if it contains more acres than are mentioned in the declaration, it is error; and if the ſheriff deliver poſſeſſion of more than are contained in the writ, an action on the caſe will lie againſt him, or an aſſiſe lies for the lands; per Roll Ch. J. Sty. 238. Mich. 1650. Lumley v. Nevill.

4. Upon a motion for execution in ejectment upon a *leaſe for 50 years, if A. B. ſhall ſo long live*, and a *verdict* for the plaintiff 20 *years ago*, and now they moved that he might have an habere facias poſſeſſionem without prejudice or diſpleaſure of the courts, *A. B. being yet living and the leaſe not yet expired*, and that they ſhould not be put to a *ſcire facias*, this being for the land, as it is ſaid in the caſe of OKEY AND VICCARS, Sid. 351. Holt Ch. J. ſaid that he was not in court when the caſe in Sid. was ruled, but he held that the ſtat. of *Weſtm.* 2. *extends to perſonal actions*, and that an ejectment is a mixed action, and in the reality as to the recovery of the land, and therefore he remitted it to the party, to take execution as he ſhould be adviſed, and he did not agree clearly with Sid. in the caſe above. Skin. 427. pl. 3. Paſch. 6 W. & M. in B. R. Marwood v. Fenwick.

5. After judgment in *ejectment* one may enter and execute his own judgment, and the aſſiſtance of the *ſheriff* is only to keep the peace; Arg. 7 Mod. 66. Mich. 1 Ann. B. R. in caſe of Withers v. Harris.

6. *Writ of error* on a judgment does not ſuperſede the poſſeſſion, or hinder the party of his *entry*, if it were lawful before; it does indeed lie upon the hands of the Court that they *cannot award execution*, but the party may enter if he will; per Powell J. 7 Mod. 69. Mich. 1 Ann. B. R. in caſe of Withers v. Harris, ſays it was lately reſolved in the caſe of Badger v. Loyd.

7. After the demandant has judgment in a common recovery *againſt the tenant, and* the *tenant againſt the vouchee*, and the *vouchee againſt the common vouchee*, the Court awards a *habere fac. ſeiſinam* to the ſheriff of the county where the lands lie, which is returned,

and ſo the recovery complete and executed; and though this is not much regarded, being only a matter of form, yet in many caſes it is not ſafe to proceed till there is a return of the habere fac. ſeiſinam, for whenever a recovery is to uſes, as all common recoveries are, no ſeiſin is in the recoveror, no uſe raiſed till the execution of the recovery, for till then the land paſſed not. Moore, 281. Trin. 7 H. 4. 17. ſo that till then no uſe ariſing, the party, to whoſe uſe the common recovery is declared to be, can convey nothing, for nemo dat quod non habet. Pig. of Recov. 153, 154.

## (R. a) When a Scire Facias is to be ſued. [17]

## How it may be, and againſt what Perſon.

[1. UPON a recognizance, if the *conuſor be dead* a ſcire facias lies *againſt the heir general, or* againſt *J. S. ſon and heir* of the conuſor without ſuing againſt the tertenants; for he ſhall not have contribution againſt *the tertenants* no more than the conuſor himſelf ſhould have. 27 H. 6. Execution, 135. 18 E. 2. Execution, 242.]

Scire facias on a judgment in debt againſt Sir William Heydon was ſued againſt Sir Chriſtopher H. and four others, who were his tertenants; he pleaded that he was ſon and heir of Sir William, and pleaded in abatement, that a ſci. fa. ſhould firſt be brought againſt him as heir, before it ſhould be brought againſt his tertenants; but adjudged per tot. Cur. that the plea was ill, and the writ was adjudged good. Cro. Eliz. 896. pl. 18. Trin. 44 Eliz. C. B. Sir Chriſtopher Heydon's caſe.

[2. When the conuſor is dead, and a ſcire facias *is ſued againſt the heir, and he is returned dead*, a ſcire facias *lies againſt the tertenants*. 18 E. 2. Execution, 242.]

[3. *But till it is returned that* the conuſor being dead *has no heir, or* that *the heir is dead*, or that the heir *is warned*, the tertenants ſhall not be warned, becauſe the heir may have an acquittance. 18 E. 2. Execution, 242.]

4. *Scire facias* was ſued *againſt the heir upon a recognizance of the father*, which was *returned nihil*, by which the plaintiff prayed ſcire facias againſt the tertenants, and had it; for it is ſaid there, that as long *as the heir has aſſets the tertenants ſhall not be charged*, and if he has nothing, proceſs ſhall be made againſt all the tertenants; for every one ſhall be contributory. Br. Scire Facias, pl. 225. cites 17 E. 3. Fitzh. Execution, 139.

5. A man *recovered an annuity againſt a parſon*; the *parſon died*; he ſhall have *ſcire facias againſt the ſucceſſor* of the parſon, and *not againſt the executor of the parſon*, and ſhall have ſci. fa. of part, and fi. fa. of the reſt; and ſo it ſeems that part was in the time of the parſon, and part in the time of his ſucceſſor, or part within the year and part after. Br. Executors, pl. 144. cites 24 E. 3. 23.

6. Scire facias upon recognizance iſſued *againſt the heir, executors, and tertenants, without naming the tertenants*, and for this cauſe, and becauſe *there were no tertenants who were die recognitionis factæ et poſtea*, where it may be intended otherwiſe that it was againſt

the tertenants who were before, therefore the writ ſhall abate. But per Finch. it lies well againſt the tertenants without naming their names, if he ſays die recognitionis factæ, &c. Br. Scire Facias, pl. 42. cites 46 E. 3. 29. and 8 H. 4. 18. accordingly.

7. If a man *recovers in writ of diſſeiſin againſt the firſt diſſeiſor*, he may have ſcire facias for execution againſt the tertenant. Br. Scire Facias, pl. 229. cites 9 H. 4. 5. and Fitzh. Redisſeiſin, 1 and 7.

8. In aſſiſe, if the *plaintiff recovers and is ouſted again* by the *firſt diſſeiſor*, who *aliened over*, the plaintiff may have redisſeiſin againſt the diſſeiſor, and ſcire facias againſt the alienee, per Tirwhite. Brooke ſays quære; for it ſeems, that by redisſeiſin a man ought to recover the land, which cannot be againſt the diſſeiſor, no tenant being named. Br. Scire Facias, pl. 70. cites 9 E. 4. 5.

[ 18 ] 9. If the ſheriff upon writ of execution returns the conuſor dead, the conuſee ſhall have ſcire facias againſt the heir and the tertenants. Br. Scire Facias, pl. 235. cites 2 R. 3. 8.

10. It was holden by the juſtices that in a ſcire facias to have execution *of a fine*, it is no plea that there are other tertenants not named in the writ; otherwiſe it is upon a ſcire facias to have execution *of a recognizance*. Mo. 571. pl. 783. Trin. 41 Eliz. B. R. Anon.

11. In ſcire facias, the defendant pleaded that he was not tenant of the freehold, and adjudged no plea; Arg. cites Mich. 44 & 45 Eliz. Rot. 834. and ſaid it was ſo adjudged in the caſe of *All-Souls college*, in ſcire facias to have execution of a judgment *in ejectione firmæ*; and the defendant in the ſcire facias *pleads that he was but leſſee for years*, and adjudged *no plea*, inſomuch that *nothing was to be recovered but only the term*, and not the freehold. 2 Brownl. 145. Mich. 9 Jac. C. B. in caſe of Kemp & al'. v. Lawrere & al'.

12. Judgment againſt an *executor*, and upon a fi. fa. the ſheriff returned that he had *waſted the teſtator's goods*, and that he had nulla bona of his own, &c. The plaintiff upon a *teſtatum that he had goods in Durham*, took out a *ſci. fa. directed to the ſheriff of Durham, de bonis propriis*, but the *teſtatum being not entered on the roll*, a ſuperſedeas was awarded, and execution made by a ſale diſcharged. Hob. 63. Hill. 12 Jac. Leiceſter v. Read.

13. Scire facias upon a judgment in debt againſt R. for 200 l. againſt his tertenants. The ſheriff returned, he warned J. C. and 3 other tenants; the tenants made default; J. C. pleaded that one R. F. was tenant of 20 acres in ſuch a town, which are the lands of the ſaid R. againſt whom the recovery was at the time of the judgment, and demanded judgment if he ſhould anſwer till R. F. was warned. It was adjudged for the defendant; for the Court ſaid, there is a *difference betwixt a ſcire facias to have execution upon a judgment in debt*, and to have execution *upon judgment in a real action; for in the laſt* this is not any plea, for *every tenant ſhall anſwer for that which he has*, and the one may loſe, and the other not; *but in* a ſcire facias to have execution of *debt*,

a *debt*, becauſe *every one ought to be contributory, the one ſhall not anſwer as long as he can ſhew that another is to be contributory with him*; and although the ſheriff return that they are tenants, yet that ſhall not conclude the defendant, but that he may ſay, that another is tertenant of parcel, who is not warned. Adjudged for the defendant. Cro. J. 506. pl. 19. Mich. 16 Jac. B. R. Michell v. Sir John Crofts.

14. In a *writ of error to reverſe a fine*, *ſome* juſtices of both benches inclined that it was *beſt to award ſci. fa. againſt the tertenant before the Court proceeds to examination of the errors*; for though the judgment ought to be reverſed againſt the party or privy, yet the plaintiff cannot be reſtored to all that he loſt till the tertenant be made privy by ſci. fa. For ſhould he be ouſted otherwiſe, he ſhall have an aſſiſe, and a ſci. fa. was awarded accordingly. Dy. 321. a. b. pl. 21. Hill. 15 Eliz. Anon.

15. If *recovery* be had *againſt the father in Borough-Engliſh*, the ſcire facias ſhall be againſt the youngeſt ſon, becauſe he is heir to this land; Arg. Palm. 241. Mich. 19 Jac. B. R. in caſe of Darcy v. Jackſon.

16. *Guardian in chivalry brought quare imp. in right of his ward*, and had judgment. In error upon this judgment the *ſci. fa. ſhall* not *be* againſt the heir or the executors of the guardian who was privy to the judgment, but *againſt the heir to the advowſon*, though he is not privy to the judgment; Arg. Palm. 241. in caſe of Darcy v. Jackſon, cites 8 H. 6. 35.

[ 19 ]

17. The anceſtor bound himſelf and his heirs in an *obligation*, and *judgment was had* thereupon againſt him, *and he died*. In a *ſci. fac.* brought *againſt the heir*, *he pleaded riens per deſcent*. The jury found that he had certain land. Agreed that the judgment ſhould be ſpecial, viz. of this land only. But otherwiſe, if debt be brought againſt the heir upon an obligation of the anceſtor, in which he bound himſelf and his heirs, but there he is charged as heir, but here only as tertenant. Palm. 419. Paſch. 1 Car. B. R. Bower v. Rivet.

3 Bulſt. 312. Boyer v. Rivett, S.C. and the arguments of the judges. The land found was only 2 acres, and all the Court agreed that the plaintiff ſhould have judgment of the moiety of two acres only notwithſtanding this falſe plea.——Jo. 87. S. C. held accordingly.——Poph. 153. S. C. held accordingly.——S. C. cited Cro. C. 296. as held accordingly, becauſe he is charged only as heir and tertenant.

18. A. ſeiſed of lands *acknowledges a recognizance* to B. in the Chancery, and afterwards *ſells the lands* to C. *and dies*. B. ſued a *ſcire fac. againſt C. tertenant and the heir of A.* To which C. pleads that A. was not ſeiſed of the lands at the time of the acknowledgment of the recognizance; and it was found by the jury for the plaintiff, upon which C. moves to arreſt judgment; for that, that the *ſheriff* had *returned the tertenant only, and not the heir*. Upon which judgment was ſtaid until the ſheriff had made an alias return, and returned the heir as well as the tertenant, and then judgment was given for the plaintiff. The plaintiff himſelf ſhewed the very caſe to me. Noy, 154. Evers v. Teynton.

Three judges held it ill, becauſe there was no return as to the heir, but juſtice Croke held it well, becauſe the defendant having pleaded, and a verdict againſt him, this is aided by the ſtatute of jeofails; whereupon another ſcire facias iſſued ad informandum curiam whether there was an heir; and thereupon the ſheriff returned that there was an heir, but did not ſay he

he was ſummoned; and though the return had been better if it had been found who was heir, and that he was ſummoned, or that there was no heir within the county, yet the miſ-return, or inſufficient return is only a diſcontinuance, and is aided by the ſtatute of jeofails, and judgment for the plaintiff. Cro. Car. 295 & 312. pl. 4. Paſch. 9 Car. B. R. Eyres v. Taunton, S. C. ——— Jo. 319. pl. 1. Eyres v. Cowly. S. C. all the juſtices held that the heir ought to be charged as tertenant, and when the ſheriff returned that there were tertenants, it ſhall be intended that the heir had not any heir who has any land by deſcent, but howſoever when the tertenant returned did not take exception to this return but pleaded over, and they were at iſſue, and this was found againſt him, this is a waiver of this exception, or at leaſt is made good by the ſtatute of jeofails, and ſo judgment for the plaintiff.

Lev. 30. Smart v. Edſun, S.C. though now by the ſtatute which gives the ſcire facias and elegit, he may charge the lands and make it real, yet it is at his election to ſue in the perſonalty only; but if he will take execution upon the lien real the charge ought to be equally againſt both, and ſcire facias againſt both. ——— Keb. 123. S. C. adjudged, and held that by taking advantage of the perſonal lien he had waived the benefit againſt the heir by elegit.

19. Judgment *in debt* is had *againſt two*, and *one dies*, and the plaintiff brings a ſcire facias againſt the ſurvivor, and recites the death of the other, and prays execution againſt the ſurvivor; the *defendant pleads, that he which died had an heir, who is in full life*, and demands judgment if execution, &c. Plaintiff demurs. Windham J. ſaid, the books of 1 E. 3. 13. f. 41. and 3 E. 3. 11. pl. 41. are direct in the point, and the reaſon why this *execution ſhall be againſt the ſurvivor* is, *becauſe the plaintiff may take a fieri facias if he will, and perhaps he will not charge the land.* Twiſden of the ſame opinion; and if upon this ſcire facias the plaintiff takes an elegit, the defendant may have an audita querela; or 2dly, he may ſuggeſt this matter upon the return of the elegit, and have a ſuperſedeas. And judgment was given for the plaintiff, niſi, &c. Raym. 26, 27. Mich. 13 Car. 2. Edſar v. Smart.

S. C. cited in a nota by the reporter, 2 Saund. 50. as adjudged.

20. The defendant pleaded a *joint judgment againſt the teſtator, and H. who is now alive*, and that he had not aſſets beyond the ſaid judgment to ſatisfy. The plaintiff demurred, and adjudged for the defendant, becauſe *the lien ſurvives*, and the executor not liable. Raym. 153. Paſch. 18 Car. 2. B. R. Harvey's caſe (executor of Harvey.)

[ 20 ]

2 Show. 42. pl. 20. S. C. Paſch. 31 Car. 2. B. R. ſays that the plea in abatement in 5 E. 4. 130. was at the niſi prius before the juſtices there after a former plea in bar, and ſo differs from the principal caſe.

21. In ſcire facias againſt *tertenants* to have execution of lands of which B. was ſeiſed at the time of the judgment given againſt him, they *pray judgment of the writ, becauſe J. S. had lands (particularly mentioned) which were B.'s at the time of the judgment, and that J. S. was not ſummoned or returned tenant, &c.* The plaintiff replied, that J. S. non eſt nec fuit tenens, &c. et hoc petit quod inquiratur, &c. and thereupon the defendants demur; whereupon peremptory judgment was prayed for the plaintiff, becauſe this is a judicial writ given by the ſtatute of Weſtm. 2. and cited 43 E. 3. 3. & 2 E. 4. 10. & 5 E. 4. 139. But per Cur. peremptory judgment ought not to be given, and *reſpondeas ouſter was awarded.* 2 Jo. 122. Hill. 30 Car. 2. B. R. Collop v. Brandlin.

S. C. cited 2 Lutw. 1268. Hill. 2 & 3 Jac. 2. in caſe of Corbet v.

22. After judgment for the plaintiff *in ejectment*, the defendant died. J. S. a ſtranger entered. The plaintiff brought a *ſcire facias againſt the executors* of the defendant and J. S. and adjudged per tot. Cur. without arguments that the ſcire well lies againſt the executors

executors *and J. S. who had entered.* 3 Lev. 100. Paſch. 34 Car. 2. C. B. Cook v. Cook. Ld. Carlingford, which was thus, ſcire facias upon a judgment in ejectment for the plaintiff was brought againſt certain perſons who entered into the lands after the death of the defendant in ejectment, and the plaintiff demanded execution of the term againſt them; the defendants demurred, but judgment was given for the plaintiff. 2 Lutw. 1267. Hill. 2 & 3 Jac. Corbet v. Ld. Carlingford.

23. 22 & 23 *Car.* 2. *cap.* 2. which is a perpetuating act of the 16 & 17 *Car.* 2. *cap.* 5. does not extend to the not warning of all the tertenants in a ſcire facias, &c. But that when an *extent is executed*, and the tertenant brings an *audita querela*, he ſhall not drive the plaintiff to *extend a new*, but the extent ſhall ſtand, and he ſhall have *contribution* againſt the reſt. Per tot. Cur. 2 Vent. 105. Mich. 1 W. & M. C. B. Prynne v. Slaughter.

24. On error to *reverſe a common recovery*, there muſt be ſci. fa. againſt the tertenants. Carth. 111. Paſch. 2 W. & M. in B. R. E. of Pembroke's caſe.

25. Where the *judgment is joint againſt two*, and *one of them dies before execution*, the *ſcire facias ought to be joint againſt both.* And Holt Ch. J. ſaid, this was a judicial writ, and might be framed upon the ſubject matter, and the form he propoſed was thus, viz. that the writ ſhould be againſt J. H. to ſhew cauſe why the plaintiff ſhould not have execution againſt him de bonis & catallis, and of the moiety of his lands, and againſt the heir and tertenants of B. H. to ſhew cauſe why (the plaintiff) ſhould not have execution of the moiety of the lands of the ſaid B. H. without mentioning any goods; quod nota. Carth. 105. 107. Hill. 2 & 3 W. & M. in B. R. Panton v. Tertenants of Hall.

26. Where a judgment is had againſt one who *dies before execution*, a ſcire facias will *not lie againſt his heir and tertenants till a nihil is returned againſt his executor.* Arg. Carth. 107. cites ſeveral year-books to that purpoſe; but cites D. 207. Reg. Jud. 57. b. contra. 1 Lev. 30. D. 207. b. 208. a. pl. 15. Bricknold v. Owen leaves it a quære if it is at the liberty and election of the plaintiff. ——See Smart v. Edſan ſupra, pl. 19.

[ 21 ]

27. Several tertenants in ſeveral counties, ſcire facias againſt the tertenants in one county only, one tertenant in another county *dies*, and this aſſigned for error. It is erroneous, and per Cur. one may be *ſummoned by a rent* liable to the judgment, and the ſummons to be upon the land. Cumb. 185. Mich. 3 W. & M. in B. R. Blake v. Gell.

28. On error to *reverſe a fine* ſcire facias muſt go againſt the *tertenants.* 1 Salk. 339. pl. 4. Hill. 6 W. 3. B. R. So to reverſe a common recovery. Carth. 111. Paſch. 2 W. & M. in B. R. E. of Pembroke's caſe.

29. Where one *undertakes to name* tertenants in the *ſcire facias* he ſhould name them all, otherwiſe where the ſcire facias is general to the tertenants. Per Holt cites 2 Cro. 507. Michel v. Croft. 3 Cro. 740. Holland v. Dantzey. Cumb. 282. Trin. 6 W. & M. in B. R. Berisford v. Cole.

30. In a ſcire facias againſt tertenants, one of them *begins his plea in bar* quod executionem habere non debet, *and concludes in abatement.*

*abatement.* Holt Ch. J. ſaid, *actio non affirms the writ*, ſo that he cannot plead in abatement afterwards, and cites 36 H. 6. 18. Judgment was quod reſpondeat ouſter. Comb. 282. Trin. 6 W. & M. in B. R. Berisford v. Cole.

31. In error to *reverſe a fine*, though in ſtrictneſs of law a *ſcire facias* being *returned againſt the conuſees is ſufficient; yet for fear of purchaſors, and in favour of them, there ſhall be a ſcire facias againſt the tertenants.* 2 Salk. 598. pl. 2. Hill. 6 W. 3. B. R. Tully's caſe.

32. *Judgment* againſt *ſeveral defendants*, and a capias and a *cepi corpus* returned *as to one*; then *another* of the defendants *dies*, and he that was in execution *eſcaped*, and a *ſcire facias againſt the ſurvivor*, the *tertenants of the deceaſed, and him that had eſcaped*; and per Cur. it may well be; but firſt the ſcire facias ought to *ſuggeſt that he had eſcaped*; and ſecondly it ought to be *de terris et tenementis* of the tertenants of the deceaſed, and de terris et tenementis *et bonis et catallis* of the ſurvivors. 12 Mod. 254. Mich. 10 W. 3. Anon.

33. Notice muſt be given upon a ſcire fieri inquiry; per Cur. where *judgment in ejectment* was *more than a year's ſtanding*, it was formerly the practice not to ſue out a ſcire facias, but on debate the matter was otherwiſe ſettled; and ſo it was in the caſes of Philips and Biron, and Copley v. Delony, and Crawley v. Heyward. 8 Mod. 366. Paſch. 11 Geo. Stede v. Lateward.

## (R. a. 2) By whom Scire Facias may be brought.

1. SCIRE facias lies not but for him that is *party* or *privy*. Arg. Ow. 3. Paſch. 26 Eliz. in caſe of Beverly v. Archbiſhop of Canterbury.

2. T. B. *recovered in a quare impedit*, and before he had execution, he was *outlawed*. The *queen brought a ſcire facias* to execute the judgment; it was reſolved that the ſcire facias to execute the judgment was well brought, and that the queen had privity enough to ſue execution of the judgment, becauſe the thing as it was in the plaintiff is in the queen, and it is *a choſe en action*, and therefore it cannot be a thing in poſſeſſion in the queen, and ſo *ſhe is not to preſent, but* is *to proſecute the execution of the judgment.* Mo. 241. pl. 378. Mich. 29 Eliz. Beverley's caſe.

[ 22 ] 3. *Two recovered in debt*, and *before execution one of them died*; if *execution is ſued in both their names* it is no error; and per tot. Cur. the ſurvivor may have execution without a ſcire facias, becauſe he is privy and party to the judgment and vouched. 21 E. 3. Noy, 150. Anon.

Brownl. 93. S. C. but no judgment —— Noy, 121. S. C. adjudged per tot. Cur.

4. It lies for *ſucceeding preſident of the college of phyſicians* for a debt recovered by him againſt one for practiſing phyſic in London, not being licenſed. Cro. J. 159. pl. 13. Paſch. 5 Jac. B. R. Dr. Atkins v. Gardiner.

5. *Exe-*

5. *Executor dur' min' ætate* or till the daughter ſhould be *married*, and then the executorſhip to ceaſe, and the daughters to be executors, gets judgment on a bond made to the teſtator.—After which the daughters married the plaintiffs.—The daughters ſhall have this judgment as executors, for they are in *privity* and in by the teſtator, and not like an *adminiſtrator* who is in by the ordinary after the death of the executor. Owen. 134. Mich. 9 Jac. C. B. Kemp and James v. Lawrence.

2 Brownl. 144. S. C. argued, ſed adjornatur.

## (S. a) The Goods of whom may be put in Execution.

[1. IF a man *recover damages againſt a corporation*, he ſhall not have execution of the goods *of the ſingular men* in their natural capacity, but of the goods of the corporation. 8 H. 6. 1. 19 H. 6. 64. b. 20 H. 9. 26 H. 6. Execution, 128.]

[2. *So if* a corporation *be fined* this ſhall be levied of the goods of the * corporation, and not of the goods of every particular man. 9 H. 6. 36. b.]

* Fol. 901.

3. If *two have goods jointly*, and the *one is condemned in damages and dies before execution*; there no execution ſhall be of thoſe goods, by reaſon of the *ſurvivor*; per Chauntrel arguendo in a replevin. Br. Execution, pl. 116. cites 7 H. 6. 2.

4. It was ſaid by Tanfield Ch. B. that a *collector of a fifteenth may levy all the tax* within one townſhip *upon the goods of one inhabitant only* if he will, and that inhabitant ſhall have aid of the Court to make each other inhabitant to be contributory; which was granted by the Court; Bromley being abſent. Lane, 65. Trin. 7 Jac. in the Exchequer. Anon.

5. If a ſum of *money be to be levied upon a corporation*, it *may be levied upon* the mayor or chief magiſtrate, or upon *any perſon being a member of the corporation*. Per Roll Ch. J. This was ſpoken in the caſe of the town of Colcheſter in Eſſex, nota. Sty. 367. Hill. 1652.

6. The *beaſts of a ſtranger levant and couchant* may be taken by the ſheriff on a levari facias; for they are the iſſues of the land; held per Cur. 1 Salk. 395. Hill. 9 W. 3. B. R. Britton v. Cole.

## (T. a.) What Thing will Diſcharge a Man out of Execution.

### [*Attainder, Outlawry, &c.*]

A man was *condemned in re-diſſeiſin, and capias iſſued pro fine regis*, by which *he was taken and committed to priſon, and after he was outlawed of felony*, and after the *king pardoned him of all felonies*, and after the plaintiff in re-diſſeiſin came and prayed that he may remain for his execution; per Fairfax, the execution is gone by the intereſt of the king, which he had in the body by the felony of him pending, and execution once extinct cannot ſurvive; quod Brian conceſſit. But per Littleton, the execution is not extinct, but ſuſpended, and the felony is the act of the defendant himſelf, which ſhall not exclude the plaintiff; and after it was awarded that he ſhould remain in priſon, till he had made gree to the party. Br. Execution, pl. 98. cites 6 E. 4. 4.

But per Jillingworth, if a man condemned in debt or damages is after convicted of a felony, and has his clergy, and is committed to the ordinary, the plaintiff ſhall not have execution of his body, quod Choke and Markham conceſſit; quære, when he has made his purgation, and is at large. Br. Execution, pl. 98. cites 6 E. 4. 4.——Mo. 753. Hall v. Truſſel. S. P.——2 And. 38. Baniſter v. Truſſel accordingly.——3 Inſt. 215.——Noy, 1. Haſtings v. Blake.——Sid. 139. The King v. Stanley and Andrews.——Cro. E. 164. pl. 1. Mich. 31 & 32 Eliz. in Scacc. Ognel v. Paſton. S. P. reſolved accordingly.——Mo. 274. 276. pl. 428. Ugnell v. Paſton. S. C. & S. P. reſolved.——2 Le. 84. pl. 112. S. C. & S. P.——Mo. 753. pl. 1036. cites the Earl of Northampton's caſe, who after his pardon was compelled to pay his debts.

[1. IF a man *in execution* for debt *at the ſuit of J. S. be attaint of felony*, and after *pardoned*, this ſhall not diſcharge him out of execution. M. 10 Car. B. R. per Cur. CHAPPEL'S CASE.]

2. *Audita querela upon execution ſued upon ſtatute-merchant, where the conuſor had a defeaſance by indenture upon repayment of* 20 *l. and had ven. fa. and ſuperſedeas*, and *at the day the conuſee appeared*, and *the other pleaded the indenture and tendered the* 20 *l.* The *conuſee imparled*, and *in the mean time the conuſor was outlawed*, which was ſhewn by Skip. and prayed writ to ſeiſe his land and goods; and therefore it ſeems to be outlawry *of felony*; for otherwiſe the king cannot ſeiſe the land for which becauſe now the *conuſor cannot purſue his ſuit nor tender ut ſupra*; by which *execution was awarded to the conuſee in C. B. where the outlawry was in B. R.* by which Hareſon came into B. R. and there ſhewed the record of outlawry; by which Thorp Juſtice commanded the marſhal, who had the body of the conuſor in ward upon the outlawry, that he ſhould not permit him to go in pain of 20 l. and bid the conuſee to ſue *writ of the Chancery* to us *containing this matter*, ſo that we may have expreſs warrant, and if the *king pardons him*, he ſhall remain for this cauſe; and ſo note that the *execution was in C. B. and the outlawry in B. R.* Br. Execution, pl. 65. cites 24 E. 3. 45, 46.

3. If the plaintiff brings *debt upon eſcape againſt a gaoler*, this is a diſcharge of execution of the body. Br. Execution, pl. 151. cites 13 H. 7. 1.

4. Per Frowike, he who is taken by ca. ſa. and *pays the money* in court, ſhall be diſcharged; & concordat ut ſupra of the eſcape, Ibid.

5. Note

5. Note per Cur. in B. R. a man is *in execution in C. B.* and the *record with the body is removed into B. R. by writ of error*, the party ſhall find *ſurety by recognizance to ſatisfy, &c. if the judgment be affirmed, and to ſue with effect*; there the body is diſcharged of the execution unleſs he will *render himſelf to priſon in diſcharge of the ſureties*, and otherwiſe the recoveror is put to ſue [ 24 ] the recognizance. Br. Execution, pl. 152. cites 16 H. 7. 2.

6. A perſon in execution for debt was *convicted of felony*, and *eſcaped*; the ſheriff is anſwerable for the debt, and ſuch felon is reſponſible to every action till he is executed in fact. Savil. 63. pl. 135. Paſch. 26 Eliz. Ognell v. Martin and Webb.

7. *Judgment* was given *againſt one in debt*, and the defendant ſuffered himſelf to be *outlawed in felony* to the intent to defraud his creditor, and after purchaſed pardon, and had reſtitution, and the plaintiff ſued execution and had it for fraud apparent. D. 245. b. pl. 65. Marg. cites 30 Eliz. Beverley's caſe.

8. Priſoner in execution *eſcapes with the permiſſion of the gaoler*. Per Cur. the execution is utterly gone and extinguiſhed, and the plaintiff at whoſe ſuit he was taken in execution ſhall never reſort to him who eſcapes, but ſhall hold himſelf to the gaoler for his remedy. 2 Le. 119. pl. 162. Mich. 29 & 30 Eliz. B. R. Phillips v. Stone.

Defendant retaken after eſcape by permiſſion of the ſheriff is in execution for the party if he will, and it ſhall not conclude the party to inforce him to take his remedy againſt the ſheriff. Cro. E. 555. pl. 10. Paſch. 39 Eliz. B. R. cites it as adjudged in caſe of Sympſon v. Boyton.

9. A man being attainted of felony was taken in execution at the ſuit of a common perſon, and *eſcaped out of priſon*, and an action of eſcape was brought againſt the ſheriffs of London, and a recovery againſt them. Ow. 69. in Truſſel's caſe, 32 Eliz. cites it as Croft's caſe, C. B.

Cro. E. 517. S. C. cited by Owen as adjudged in Scacc. that an action of debt on the eſcape was maintainable, which proves that he might be taken in execution during the attainder. But the reporter adds: quære, if it were not adjudged, becauſe he being in the cuſtody after the pardon ſhould then be ſaid to be in execution for the party.

10. In *debt* the *defendant* ſaid that he is *attainted of felony*, that the attainder yet continues, and demands judgment if he ſhall be put to anſwer, and adjudged that he ſhall anſwer, and *may be taken in execution*, and that ſhall not be prejudicial to the king; for notwithſtanding the execution of the party the king may have him executed when he will. 2dly, Men attaint or outlawed ſhall be put to anſwer in any action againſt them, becauſe it is to their prejudice; but in an action brought by them they ſhall not be anſwered, becauſe it is to their benefit. 3dly, They ſhall be put to anſwer by reaſon of the poſſibility of their being pardoned. Note, That this judgment was much againſt the opinion of Walmeſly, who ſaid it is in vain to put any man to anſwer in an action real or perſonal, who hath in truth nothing to be taken in execution. Noy, 1. Haſting v. Blake.

Cro. E. 516. pl. 41. Mich. 38 & 39 Eliz. C. B. Banyſter v. Truſſel, S. P. and ſeems to be S. C. and adjudged againſt the opinion of Walmſley, that he ſhould anſwer; for his body is his own during the attainder, for he may purchaſe land, and if there be any perſonal wrong done to him he may, when he is pardoned, have his action for it; and it is not reaſon that a man doing a wrong ſhall advantage himſelf thereby, and take away another man's action; and the queen and the plaintiff may both be ſerved, the queen, by executing him when ſhe pleaſes, and the plaintiff in the interim to have him in execution. ——S. C. cited

cited by Dodridge J. Lat. 145. —— Ow. 69. Trin. 32 Eliz. B. R. S. C. says that at last by advice of the Court, because he was indebted to many persons, and to discharge himself from his creditors he intended to have a pardon for his life, and so deceive them, therefore he was committed to the Marshalsea upon this execution —— But Cro. E. 213. pl. 5. Hill. 33 Eliz. B. R. Trussel's case, it was resolved that he should be discharged out of execution, for being a person attainted of felony the queen hath interest in his body, and so he cannot be taken in execution for debt, and therefore they discharged him.

11. A. was *indicted of robbery*, and after was *pardoned* and discharged of the felony, and notwithstanding he was *detained in prison for debt* due before. D. 245. b. pl. 65. Marg. cites 16 Jac. Atkinson's case.

[ 25 ]

Escape of one by consent of sheriff does not hinder

12. Execution is discharged by plaintiff's *agreeing to defendant's going at large*. Hetl. 79. Hill. 3 Car. C. B. Wiggons v. Darcy, per Richardson J. but Harvey J. e contra.

but the other may be taken in execution. Cro. E. 478. pl. 9. Trin. 38 Eliz. B. R. Blosield's case. —— Cro. E. 555. pl. 10. Pasch. 39 Eliz. B. R. Blomfield v. Roswick, S. P.

13. *Release to one* where two are in execution for the same debt is a discharge of the other. Hetl. 79. Hill. 3 Car. C. B. in case of Wiggons v. Darcy. Per Richardson J.

14. Persons *attainted* shall answer for debt; per Cur. Mich. 15 Car. 2. B. R. Sid. 160. The King v. Sir Charles Stanley, cites Co. Ent. 246. b. 248. a. 3 Inst. 215. Noy, 1. Br. Execution, 98.

15. A person committed for a *misdemeanor* shall not be charged in execution without *leave of the Court* at the suit of any party. Sid. 154. Hill. 15 Car. 2. B. R. Sir John Jackson's case.

16. A person *indicted* and convicted *of striking in Westminster-Hall* was afterwards pardoned; but the Court, on allowing the pardon, would not discharge him of civil pleas entered in the Marshalsea against him. Sid. 211. pl. 8. Trin. 16 Car. 2. B. R. The King v. Bockman.

So if there be judgment against 3, and one is taken

17. *Prisoner going at large by consent of the plaintiff* is a discharge of the execution, and if he be retaken an audita quer' lies. Sty. 117. Trin. 24 Car. Walker v. Alder.

in execution, and he is afterwards set at large by the plaintiff's consent; if either of other 2 be afterwards taken in execution upon the same judgment, he may have an audita quer', but he cannot be relieved on a motion in Court, though grounded on an affidavit; per Roll Chief J. Sty. 387. Trin. 24 Car. Price v. Goodrick.

## (U. a) After Execution.

### In what Cases Execution may be after Execution.

[1. ] IF a man be *condemned for a fine to the king, and damages to the party in an action where capias lies in the original*, and he is *taken by capias pro fine* at the suit of the king, and after *suffered to escape*, yet the party at whose suit the recovery was, may have execution by fieri facias or elegit, though he may, if he will, make

make this an eſcape to him, and charge the ſheriff, for he was in execution to him at his election. 18 H. 6. 19.]

[2. If A. be *chargeable to the king for* 27*l.* *for an amerciament*, for which *proceſs iſſues* out of the Exchequer to the ſheriff *to levy it*, and the under-ſheriff comes to A. upon another occaſion, and *A. ſays* to him, *you owe* 30*l.* *by bond*, *I pray pay me*; to which *the under-ſheriff ſays*, *you owe me* 27*l.* *for an amercement*, which I ought to levy by proceſs which I have, *and if you will give me my bond*, *I will diſcharge you of your amercement*, *and pay you* 3*l.* to which *A. agrees*, *and delivers the obligation* accordingly; this is a good execution, and the amercement well levied in law, ſo that A. ſhall not be charged again by the king but the ſheriff. M. 8 Ja. in the Exchequer adjudged. SIR DANIEL NORTON'S CASE.] Lane, 74. S. C. and agreed per Cur. that this was a good levy of the ſaid amerce-ment.

[3. If a man be *taken by a capias ad ſatisfaciendum*, he is preſently in execution upon the arreſt before the day of return of the writ. Dubitatur KELLOWAY. 12 H. 7. 2. b.]

[ 26 ]
See (U.a.2)

## After Eſcape.

[4. If a man *taken in execution* by a capias be *put in priſon*, *and* after *eſcapes*, and then the *ſheriff dies*, a new capias lies againſt him, becauſe otherwiſe the plaintiff is without remedy. 41 Aſſ. 15. adjudged.] S. P. Brook ſays quære if this ſhall ſerve as other execution to the party. Becauſe he has no remedy againſt the ſheriff who is dead. Br. Execution, pl. 86. cites S. C.

[5. If a *man in execution eſcapes*, and the *ſheriff makes freſh ſuit* after him, and after *takes him* again, though it be *a long time after*, yet he ſhall be ſaid in execution again, becauſe he ſhall not take advantage of his own wrong. 3 Rep. 52. * RIDGEWAY. Reſolved. Dubitatur 12 H. 7. KELLOWAY, 2. b.] * See Audita Querela (D), pl. 4. S. C.

[6. *So* if a man upon a *capias ad ſatisfaciendum* be taken in execution, and after *reſcues himſelf from the ſheriff and eſcapes*, the plaintiff may have a *new capias* againſt him, and take him again, *the firſt writ not being returned*. P. 8 Car. B. R. between SIR ROBERT † MOUNSON AND CLAYTON, adjudged per Cur. upon a ſcire facias after the year, becauſe he ſhall not take advantage of his own wrong. Intratur Trin. 7 Car. Rot. 1343. P. 7 Ja. B. agreed per Cur. between RODFORD AND HOPKINS. 3 Rep. 52. b. ‡ RIDGEWAY'S CASE. ‖ Contra 14 H. 7. 1. per Cur. Contra § 41 Aſſ. 15.] † Cro. C. 240. pl. 24. and 255. pl. 7. S. C. adjudged. ‡ See tit. Audita Querela (D), pl. 4. S. C. ‖ Br. Execution, pl. 58. cites S. C. accordingly, that the party ſhall not have other execution nor other remedy, but action againſt the gaoler, and yet after the eſcape the gaoler may re-take him, though he was out of view; quod nota. § Br. Execution, pl. 86. cites S. C.

[7. *So* in the ſaid caſe, if the ſheriff *had returned the writ and the reſcue*, the plaintiff might have a new capias againſt him for the cauſe aforeſaid. P. 8 Car. B. R. per Cur. agreed in the ſaid caſe.]

[8. If

Fol. 902.

S. P. Br. Execution, pl. 151. cites 13 H. 7. per Keble, which was agreed per Frowike.

[8. If A. be in execution at the ſuit of B. and *eſcapes with the aſſent of the ſheriff*, and after *the ſheriff retakes him, and keeps* [him] *in priſon*, he ſhall be in execution to B. becauſe though B. may bring an action againſt the ſheriff for this voluntary eſcape, yet it is at his election; for the party in execution by his own wrong ſhall not put B. to his action againſt the ſheriff againſt his will, and it may be that the ſheriff is not able to give him recompence. Hill. 10 Car. B. between * TREVILLIAN AND THE LORD ROBERTS, Rot. 1622, where an audita querela was brought upon this ſurmiſe, and iſſue taken upon the voluntary eſcape, and found for the plaintiff, and yet adjudged in arreſt of judgment againſt the plaintiff. Contra Hobart's Reports, 273. VISCOUNT OF ESSEX'S CASE.]

* See tit. Audita Querela (D), pl. 4. S. C.

[9. If a man *in execution in the county of Devon eſcapes into the county of Somerſet, where he is taken in execution*, and after the *ſheriff of Devon, upon freſh ſuit, finds him in priſon in Somerſet, quære, how he may charge the ſheriff of Somerſet with the firſt execution, or put the party in execution, inaſmuch as he cannot retake him.*]

[ 27 ]

See (U. a. 3) See Statute Merchant, &c. (T).

## After Execution.

Br. Execution, pl. 104. cites S. C. accordingly; and it was ſaid that his being in priſon for a fine to the king was not an execution to the party.

[10. If a man be *impriſoned for a fine to the king*, and after there is agreement between the priſoner and the plaintiff, and the *plaintiff ſuffers him to go at large after the fine paid upon recognizance made for the duty to the plaintiff*, if the defendant does not pay the duty, the plaintiff may ſue execution upon the condemnation, or upon the recognizance, at his pleaſure, for he was not in execution at his ſuit at his *election*. 21 E. 4. 67. b.]

Cro. E. 850. pl. 6. S. C. & S. P. held accordingly by Popham and Fenner, but Gawdy doubted.

[11. If a man *recovers debt againſt B. who is* after *taken upon a capias utlagatum within the year and put in priſon*, though he be in execution prima facie, yet the party may *elect* that he ſhall not be in execution by this for him, and ſo have a new execution by capias, though the *ſheriff ſuffers him to eſcape upon the capias utlagatum*, for he never was in execution by this at his election. M. 43 & 44 Eliz. B. R. between SHAW AND CUTTERESSE will prove this. Contra H. 7 Ja. B. admitted Curia.]

Br. Execution, pl. 104. cites S. C. accordingly.

[12. If a man *in execution at the ſuit of the party ſues a writ of error, and finds bail with recognizance to ſue with effect*, if the judgment be *affirmed* the plaintiff ſhall not have further execution, becauſe he had execution before, but he *muſt ſue execution upon* the recognizance. 21 E. 4. 67. b.]

[13. If a man *in execution ſues a ſcire facias upon a deed, and the party lets him out by recognizance*, if it be *found not the deed* of him who recovered, he cannot have execution but upon the recognizance. 21 E. 4. 67. b.]

[14. If

[14. If a *ſheriff levies goods by* force of a *fieri facias*, and does *not deliver them to the party, nor returns his writ*, the plaintiff may have new fieri facias, becauſe a record ſhall not be avoided by a naked matter in fact. P. 7 Ja. B. Warburton ſaid it was adjudged P. 1 Ja. B. per Cur.]

Adjudged per 3 juſtices that the debtee is barred by this execution, and debt lies againſt the adminiſtrator of the ſheriff, Jo. 430. Perkinſon v. Cilliford. ——— Mar. 13.

In a ſcire facias againſt the defendant upon the judgment, defendant may plead this matter, and the plaintiff muſt take his remedy againſt the ſheriff, whoſe ſale of defendant's goods is good, and cannot be defeated. Goulſb. 170. Foe v. Baſton.

Debt of 10l. the plaintiff counted that he recovered againſt the defendant in ſpecial aſſize 10l. in damages before theſe juſtices; the defendant ſaid, that within the year he ſued fieri facias to the ſheriff, by which he levied it, and paid it to the plaintiff; judgment ſi actio, and the payment over to the plaintiff was of little regard, but only the levying by the ſheriff, and Hill and Hank. held the plea no plea, and that the defendant ſhall anſwer it to the plaintiff, and ſhall have his remedy againſt the ſheriff. But Thirn. was ſtrongly againſt it, and that the debt is of record, and by the fieri facias it is levied of record by office of authority, and whether he pays it over to the plaintiff, or ſends it into court as he ought, or not, is no default in the defendant; and that the levying was good, for the defendant cannot compel the ſheriff to ſend it into court, nor deliver it to the plaintiff, and therefore no default in him, and he excuſed; which Brook ſays is the beſt opinion, and the reporter accordingly. And after the parties agreed; and the writ was quod denarios ill' habeas hic in Cur. tali die, &c. Et ſi fit coram juſticiar' aſſiſæ, tunc denarios illos habeas ad proximam ſeſſion', &c. Br. Execution, pl. 35. cites 11 H. 4. 58. ——— And ſee 26 H. 6. 25. tit. And Book of Entries, 170. That it is admitted for a good plea in ſcire facias, and iſſue taken thereupon; and the plaintiff may have account upon it againſt the ſheriff who levied it, and did not deliver it to the Court nor to the plaintiff, as it ſeems there. Ibid.

[15. If a man *before he is in execution finds bail upon a writ of error*, and after the *judgment is affirmed*, the plaintiff may have action upon the recognizance, or have execution upon the record. 21 E. 4. 67. b.]

Br. Execution, pl. 104. cites S. C. accordingly.

[16. If a man *in execution upon a ſtatute ſtaple* or merchant, *ſues an audita querela*, and upon this *finds bail, and* after *does not proſecute, or is adjudged againſt him*, it ſeems by the ſtatute 11 H. 6. cap. 5. that he may be taken in execution again.]

[ 28 ]

[17. If a man *in execution be bailed by the Court*, yet he may be after taken in execution again. P. 13 Ja. B. R. per Cooke.]

Fol. 903.

[18. If A. recovers againſt B. an *execution de bonis teſtatoris ſi non de bonis propriis*, and the *ſheriff upon a fieri facias levies the money*, and after *upon another fieri facias* directed to him *returns a devaſtavit*, and upon this a *ſcire facias* is granted againſt B. to ſhew cauſe, &c. B. may diſcharge himſelf from this devaſtavit by Tr. 11 Car. B. R. levied the money upon the firſt fieri facias. Plea that the ſheriff per Cur. between MIDDLETON AND POWEL.]

[19. If a man *impriſoned upon a capias pro fine* ſues a *writ of error*, and upon this is *bound by recognizance* to the plaintiff *to proſecute it with effect, and alſo if judgment be affirmed* that he *will render himſelf to priſon*, this is a good condition. 11 H. 7. 15. Dubitatur.]

## After Delivery by Parliament.

See (U.a.4)

[20. If the *defendant in an account be adjudged to account, and* after *committed to priſon by the auditors* for not making a perfect account, and after he is delivered out of priſon by the privilege

of

of parliament, becauſe he *is a burgeſs of the parliament, yet after the parliament ended* he may be *taken again by a ſpecial writ*, reciting the ſpecial matter, and committed to the priſon to remain there as he was before. Mich. 4 Ja. B. R. adjudged between SIR THOMAS EGERTON AND BRERETON.]

See (U.a.5)

## After Death in Execution.

[21. If a man *recovers againſt two, and takes one in execution, who dies in execution*, he may after *take the other* in execution; for he might before the death have taken him alſo in execution, and the death cannot alter it. M. 4 Ja. B. R. between * WILLIAMS AND CURTEIS, per Fenner and Tanfield. 5 Rep. 87. P. 24 El. adjudged between † JONES AND WILLIAMS. P. 25 El. B. R. Rot. 429. between HAWKIN AND ARDYN, if *one be* taken *in execution, and after the other be ſued upon the ſame obligation*, and *he pleads this in bar*, yet adjudged upon demurrer no plea, ſcilicet, that the death of the other in execution is no ſatisfaction. Maſter Hodgſon an attorney of B. R. told me this, and gave the number roll of it to me.]

* Cro. J. 143. S. C. † S.C. cited 5 Rep. 86. b. —— Cro. E. 851. cites S. C.

If a man recover damages in an action of treſpaſs before juſtices of oyer and terminer, and has the party in execution dies in priſon, he who recovered may ſue a certiorari to the juſtices to remove the record into B. R. that the juſtices there may award execution as the law requires in ſuch caſe. And I think, in that caſe, that the party ſhall have execution by elegit, or by ſcire facias; for it ſeems not to be reaſonable, that the death of him who dies in priſon ſhould be a ſatisfaction to the party. Tamen quære, for Fitzherbert ſays he doubts of it. F. N. B. 246. (B.)

[22. If a man *recovers againſt J. S. and takes him* in execution by capias, and after J. S. *dies in execution*, no new execution lies againſt his *executors* or adminiſtrators. 33 H. 6. 48. 7 H. 6. 7. Tr. 13 Ja. B. per Curiam adjudged upon ſolemn argument between FOSTER AND JACKSON. See the ſame caſe, Hobart's Reports, 82. and there cites 85. between WILLIAMS AND CURTOIES adjudged, Mich. 43 El. B. R. between SHAW AND CUTTERESS, per Cur. Contra 5 Rep. 86. b. BLUMFIELD'S CASE reſolved. 47 E. 3. Execution, 41.]

* Cro. J. 136. pl. 11. Mich. 4 Jac. B. R. Williams v. Cutteris. S. C. Tanfield and Yelverton J. cæteris abſentibus held that it was a good bar, but it being a new caſe and not formerly adjudged, adjornatur. —— Ibid. 143. pl. 2. S. C. adjudged for the defendant that the plea is good, but Yelverton doubted.

* [ 29 ]

Cro. E. 850. pl. 6. S. C. and Popham and Fenner held that it was not an execution for the plaintiff, without plaintiff's prayer to have it ſo; but Gawdy doubted; judgment for the plaintiff niſi, &c. —— S. C. cited 5 Mod. 201. and ſays Arg. that according to Gawdy's opinion, and the reſolution in Garnon's caſe, there have been ſubſequent judgments that when the party is taken on the cap. utlag. he ſhall be in execution for the plaintiff if he will, though his body was never brought into court, cites Bridgm. 6. More v. Reynell, and Cro. J. 619. S. C. and Sid. 380. Buckland v. Kelland.

[23. If a man *recovers in debt againſt J. S. and* after *outlaws him upon the judgment, and* after J. S. *within the year is taken by capias utlagatum*, and after J. S. *dies in priſon before any prayer* made by the recoveror that he ſhall be in execution at his ſuit, yet this is not any ſatisfaction of the debt, but his *executors* or adminiſtrators may be charged for it; for he was in execution by the taking upon the capias utlagatum for the party prima facie at the *election* of the party, but this is only at his election. M. 43 & 44 El. B. R. per Cur. between SHAW AND CUTTERESS.]

## (U. a. 2) After Eſcape.

See (U a.) pl. 4.

1. IF a *man* be *in execution by his body and lands* upon a ſtatute, if the *ſheriff permit the conuſor to go at liberty*, yet the *execution of the land is not diſcharged*; but if he go at large by the *conſent of the conuſee*, then the whole execution is diſcharged, and the conuſor ſhall have his land again preſently; per Anderſon Ch. J. Le. 230. pl. 313. Paſch. 33 Eliz. C. B. Linacre's caſe.

2. In an action for an eſcape, the queſtion was, whether the plaintiff may take out a ca. ſa. or fi. fa. againſt the defendant, *after a voluntary eſcape permitted by the ſheriff or the gaoler?* The Court would not ſuffer it to be argued, becauſe it was lately ſettled that it was at the plaintiff's election to do either, which judgment was affirmed upon a writ of error in the Exchequer Chamber; but in Ld. Ch. J. Vaughan's time the court of C. B. was divided, but it is ſince ſettled. 2 Mod. 136. Mich. 28 Car. 2. C. B. Baſſet v. Salter.

3. If there is a *voluntary eſcape* by the *officer* who *takes the party again* in execution, which he ought not to do, yet the *plaintiff may have him in execution if he will.* Comb. 396. Mich. 8 W. 3. B. R. Etherick v. Brewell.

## (U. a. 3) After Execution.

See (U. a) pl. 10, &c.

§ [ 30 ]

1. * 13 *E.* 1. cap. 45. *BECAUSE that of ſuch things as be* † *recorded before the chancellor and the juſtices of the king that have record and be inrolled in their rolls,* ‡ *proceſs of plea ought not to be made by ſummons, attachments,* ‖ *eſſoin, view of land, and other* ¶ *ſolemnities of the court, as hath been uſed to be done of bargains and covenants made out of the court.*

* Some diverſity of opinion has been, whether there was a ſcire facias at the common law before this act, and the doubt grew for want of diſtinguiſhing between perſonal actions, and real actions; for true it is, that in perſonal actions, if the plaintiff after judgment given, or recognizance § knowledged, ſued out no proceſs of execution within the year, he could have no ſcire facias; but the plaintiff or cogniſee was driven to his original, which is to be intended upon the judgment or recognizance, as in actions of debt, writs of annuity, or other perſonal actions, wherein debts or damages were recovered, or upon recognizances; but in real actions, or upon a fine levied, though the demandant or cogniſee ſued out no execution within the year after the judgment given, or fine levied, the demandant or conuſee of the fine after the year might have had a ſcire facias for the land, &c. becauſe he could not have any new original, either upon the judgment or fine, as he might have in the other caſes. Now this act gives a ſcire facias in perſonal actions in lieu of a new original; and in real actions two things are remedied by this act, that is, 1ſt, The tedious proceſs, which was at the common law, is hereby abridged; and, 2dly, The great delays uſed therein are ouſted, as views of the land, and other ſolemnities uſed in real actions. 2 Inſt. 469, 470.

† Regularly upon this act, a ſcire facias cannot be granted but upon a record; but in many caſes ſcire facias is granted, partly upon a record; and partly upon ſuch a ſuggeſtion, without which no proceeding could be upon the record. 2 Inſt. 470.

‡ Here be four things particularly named to be ouſted, viz. proceſs of ſummons, proceſs of attachment, eſſoins, view of the land, and then general words, other ſolemnities of courts. 2 Inſt. 470.

‖ The eſſoin of the tenant or defendant is not only reſtrained by this act, but of the prayee in aid, who is a ſtranger to the writ, is alſo reſtrained. 2 Inſt. 470.

And the plaintiff in the ſcire facias ſhall not be eſſoined, although it is his own delay. 2 Inſt. 470.

¶ It has been reſolved, that a protection is within theſe words, and that it ſhould not be allowed in a ſcire facias. 2 Inſt. 470.

And divers authorities are againſt it. 2 Inſt. 470.

Aid, age, and receit ſhall be granted in a ſcire facias; for ſolemnitates curiæ are properly delays in reſpect of the ſolemn judicial proceedings of Court, and theſe words extend not to the right of the party to have his age, or to be received, or to have aid of another. 2 Inſt. 470.

* Upon a fine for grant and render of an advowſon, a ſcire facias ſhall be granted, for this is a judicia, and no original writ, for de advocat' non ſunt niſi tria brevia originalia. 2 Inſt. 470.

*From henceforth it is to be obſerved, that thoſe things which are found inrolled before them that have record, or contained in * fines, whether they be contracts, covenants, obligations, ſervices or cuſtoms, knowledged or other things whatſoever inrolled, wherein the king's court, without offence of the law and cuſtom, may execute their authority, from henceforth they ſhall have ſuch vigour, that † hereafter it ſhall not need to plead for them.*

And though fines be here named, yet recoveries in real actions are within the purview of this act. 2 Inſt. 470.

† This branch is thus to be underſtood, that the tenant or defendant, though he be a ſtranger to the recovery, ſhall not plead againſt the recovery any thing that proves it erroneous or voidable; but he may plead matter of that which proves the recovery void, as that it was had coram non judice, or the like. 2 Inſt. 470.

Neither ſhall he in ſcire facias plead any thing againſt the title or matter of the recovery, where he may have an action, and therein falſify the ſame. 2 Inſt. 470.

But the tenant or defendant may plead divers matters after the judgment given to bar the plaintiff of execution, as outlawry, or a releaſe of actions, &c. 2 Inſt. 470.

‖ [ 31 ]

‡ It hath been ruled, that theſe words have *relation to the teſte of the recognizance, and not to the day of payment*, and therefore if a recognizance be knowledged to pay a ſum a year and half after, a ſcire facias lies and no fieri facias; but I take that rule to be againſt law, and that recens cognitio is as much as recens ſolutio cognitionis; for the words be ſtatim habeat breve de executione, which he cannot have before the day of payment be paſt. 2 Inſt 471.

*But when the plaintiff comes to the king's court, if the ‡ recognizance or fine be freſh, that is to ſay, levied within the year of the writ, he ſhall forthwith have a writ of execution of the ſame recognizance made.*

If a *judgment* be given *in a writ of annuity*, the plaintiff ſhall have execution within the year after every day of payment, by fieri facias or elegit, though it be many years after the judgment; and ſo if a man be bound by recognizance in 100l. to pay it yearly at 5 ſeveral days 20l. now immediately after the 1ſt day of payment, he may have an elegit or fieri facias for the 20l. and ſo at the 2d day paſſed, &c. and yet in both theſe caſes there is above a year after the judgment given, or recognizance knowledged, therefore theſe words, recens fit cognitio, ſhall relate to the day of payment of the money, which is the effect of the recognizance, and not to the teſte of the recognizance, which is but the aſſurance for payment of the money. 2 Inſt. 471.

And this word (*recens* or *freſh*) imports, when the party may ſue for the ſame, which he cannot do before the day of payment be paſt; but this is to be underſtood when the ſeveral days of payment ‖ are contained in the recognizance itſelf, for if there be a day of payment expreſſed in the recognizance, and a condition or defeaſance thereof the ſame limiting other days of payment, there theſe words, recens fit cognitio, &c. ſhall relate to the day of payment expreſſed in the recognizance, and not to the condition or defeaſance, and if there be no day of payment in the recognizance, then theſe words, recens cognitio, &c. do relate to the teſte of the recognizance. 2 Inſt. 471.

And albeit the plaintiff cannot have execution within the year, according to the letter of this ſtatute, yet if he come within a year of the payment, it ſuffices. 2 Inſt. 471.

If lands be granted and rendered by fine, and in the fine it be mentioned that W. holds the ſame for 26 years after the term ended, he ſhall have a ſcire facias, albeit he could have no writ of execution within the year. 2 Inſt. 471.

*And ſo* it is if a reverſion expectant upon an eſtate for life be granted by fine, after tenant for life lives many years and dies, the conuſee ſhall have a ſcire facias, and yet could he not have a writ of execution within the year. 2 Inſt. 471.

If the demandant or plaintiff takes his proceſs of execution within the year, though it be not ſerved within the year, yet if he continue the ſame he may have proceſs of execution at any time after the year. 2 Inſt. 471.

One that is not party to the record, recognizance, fine, or judgment, as the heir, executor, or adminiſtrator, though they be privy, and though it be within the year, ſhall have no writ of execution, but have a ſcire facias to enable themſelves to the ſuit, and ſo likewiſe of the tenant or defendant's part, for the

the alteration of perſon alters the proceſs; otherwiſe it is in caſe of a ſtatute-ſtaple, or merchant, &c. becauſe the proceſs is given by other acts of parliament. 2 Inſt. 471.

But if a judgment be given in the court of C. B. and within the year the judgment is affirmed. In a writ of error in B. R. the alteration of the Court works no alteration of the proceſs, but he may have his writ of execution within the year, and not be driven to his ſcire facias, though it has been otherwiſe holden, but now the common experience and later reſolutions are to the contrary. 2 Inſt. 471.

* *And if the recognizance were made, or the fine levied of a further time paſſed, the ſheriff ſhall be commanded, that he give knowledge to the party of whom it is complained, that he be afore the juſtices at a certain day, to ſhew if he have any thing to ſay why ſuch matters inrolled or contained in the fine ought not to have execution.*

* Upon theſe words, *ſcire facias parti*, in a ſcire facias upon a recognizance out of C. B. the conuſee muſt name all the tertenants at his peril; but in other courts the writ is general againſt all tertenants. 2 Inſt. 472.

The point of the writ is quare executionem habere non debet, and therefore the tenant ſhall not vouch. 2 Inſt. 472.

This ſtatute is in the affirmative, and therefore it reſtrains not the common law, but the party may waive the benefit of the ſcire facias given by this act, and take his original action of debt by the common law. 2 Inſt. 472.

And ſeeing the words of the ſcire facias be, quare executionem habere non debet, the tenant or defendant may plead any thing in bar of execution, as has been ſaid before. 2 Inſt. 472.

† *And if he do not come at the day, or peradventure do come, and can ſay nothing why execution ought not to be done, the ſheriff ſhall be commanded to cauſe the thing inrolled or contained in the fine to be executed.*

† The party muſt either be warned, or regularly 2 nihils returned, and then by default execution ſhall be granted, and how the warning is to be made, it appears in our books. 2 Inſt. 472.

The courſe of the court of C. B. is, that upon a recovery the plaintiff ſhall have execution upon one nihil returned. 2 Inſt. 472.

‡ *In like manner an ordinary ſhall be commanded in his caſe,* ‖ *obſerving nevertheleſs, as before is ſaid of a mean, which by recognizance or judgment is bound to acquit.*

‡ This branch is to be thus intended, that if a ſcire facias be brought upon a recognizance, or upon a judgment in a writ of annuity, and the ſheriff return that the defendant is clericus & beneficiatus nullum habens laicum feodum, &c. the plaintiff ſhall have a writ to the biſhop of the ſame dioceſs to warn the defendant, and upon warning, or 2 nihils returned, and default made, or if he appears, and ſhews no matter wherefore execution ſhall not be granted, then a writ ſhall be awarded to the biſhop to levy execution de bonis eccleſiaſticis. 2 Inſt. 472.

‖ This clauſe was added in majorem rei cautelam, that the proviſion before made at this parliament, cap. 9. in caſe that in a writ of meſne, poſtquam medius venerit in curiam & cognoverit, quod acquietare debet tenentem ſuum, vel adjudicetur ad acquietandum, ſi poſt hujus modi cognitionem aut judicium querimonia perveniat, quod medius non acquietavit tenentem ſuum tunc exeat breve de judicio, quod vic' diſtringat medium ad acquietandum tenentem, whereupon fore judger is given, now if the plaintiff in the writ of meſne ſhould only take his ſcire facias, then § no fore-judger ſhould follow thereupon, therefore this clauſe was added, that the former general words of this act, ſive alia quæcunque irrotulata, &c. ſhould not take away the benefit of the former act concerning the fore-judger in a writ of meſne, but as has been ſaid, this act being in the affirmative takes not away neither the common law, nor the benefit of the former act concerning the ſaid fore-judger, for the plaintiff may take advantage either of the one or other, at his election; wherein it is to be obſerved, that an act of parliament cannot be made too plain; but note, the fore-judger is given only againſt him that made the acknowledgment, or againſt whom judgment was given, and not againſt his heir, and therefore this act is an addition declarative to the former, viz. that a ſcire facias may in thoſe caſes lie againſt the heir. 2 Inſt. 472.

§ [ 32 ]

2. Where *two are bound by an obligation* to me *ſeverally*, and I *take* action and *execution of the body of the one*, I ſhall not have action nor execution againſt the other, though the firſt *dies or eſcapes*. Br. Execution, pl. 8. cites 33 H. 6. 47.

3. Where a man is bound in a *recognizance in* 100*l. to be paid at such a day* 20*l. and such another day* 20*l. and so of the residue*, &c. the obligee may sue for every day broken a several execution by elegit or levari facias, and shall not stay till the last day, as he shall do in case of an obligation. And so nota, that elegit is execution upon recognizance. Br. Execution, pl. 142. cites F. N. B. 130. (H). 267. (B).

4. *Error* was brought in redditione *judicii in writ of debt, and in proclamation of outlawry in it*, and he *found mainprise, and did not keep his day*, and the plaintiff in the debt prayed capias for execution; per Mordant, he was in execution by the mainprise, and therefore shall not have execution, but shall have scire facias upon the recognizance of the mainprize. Per Cur. *he was not in execution*; for the *recognizance was only to the king*; quod nota; and it appears here that once execution is for ever; for he shall not have execution again. Br. Execution, pl. 92. cites 8 H. 7. 9, 10.

5. If the sheriff *returns cepi corpus upon ca. sa.* the plaintiff shall not have other execution. Br. Execution, pl. 151. cites 13 H. 7. 1. per Keble.

6. So if he *returns* upon a fi. fa. quod *fieri feci, sed non inveni emptores.* Ibid.

† [ 33 ] It appears by the preamble of the stat. of 32 H. 8. and divers books, that *after a full and perfect execution* had *by extent returned and of record*, there shall *never be any re extent upon any eviction*; *but if* the extent be *insufficient in law*, there may go out a new extent. Co. Litt. 290. a. says nota.

7. 32 *H. 8. cap. 5. Whereas before this time divers and sundry persons have sued executions, as well upon judgments for them given of their debts or damages, as upon such statutes merchants, statutes of the staple, or recognizances, as have been to them before made, recognized, and knowledged; and thereupon such lands, tenements, and other hereditaments, as were liable to the same execution, have been by reasonable extent to them delivered in execution for the satisfaction of their said debts and damages, according to the laws of this realm. Nevertheless, it has been oftentimes seen, that such* lands, *tenements, and hereditaments, so delivered, and had* in execution, have been recovered, *or lawfully devested, taken away*, or evicted from the possession of the said recoverors, *obligees*, or recognizees, *their executors or assigns, before such time as they have been fully satisfied and payed off their debts and damages without any manner of fraud, deceit, covin, collusion, or other default in the said recoverors, obligees, or recognizees, their executors and assigns*, * by reason whereof *the said recoverors, obligees, and recognizees* have been *thereby set clearly* without remedy *by any manner of suit of the law, to recover or come by any such part or parcel of their said debts and damages as was behind, and not by them levied or received, before such time as the said lands, tenements, and other hereditaments so by them had in execution, were recovered, lawfully devested, taken or evicted out of and from their possessions as is aforesaid, to their great hurt and loss, and much seeming to be against equal justice and good conscience.*

* Where the tenant by execution has remedy given to him by law, after eviction, there the statute extends not to it, † for the act says, by reason whereof, the said recoverors, obligees and recognizees, have been clearly set without remedy, &c. and the *body refers to the preamble*, and the party ought not to have double satisfaction, one by the former laws, and another by this statute.

And therefore *if part* of the land, &c. *be evicted* from the tenant by execution, *this statute extends not to it*; because he should hold the residue till he be fully satisfied, and he must be contented if all be evicted

evicted saving one acre, to hold that, though it be but a poor remedy; for no new execution in that case he can have upon this statute, therefore if the conusee has remedy in præsenti for part, or in futuro for all or part, this statute extends not to it.

2dly, If a man be *bound to A.* in a statute of 1000l. *and by a later statute to B.* in 100l. and *B. first extends*, and *then A. extends* and takes the land from B. yet B. shall have no aid of the statute, because after the extent of A., B. shall re-enjoy the land, by force of this former execution.

3dly, If the *wife of the conusor recovers dower* against the tenant by execution, he shall hold over, and shall have no aid of this statute.

4thly, If a man *puts out his lessee* for years, or disseises his lessee for life, *and after acknowledges a statute*, and *execution is sued* against him, and the *lessee re-enters*, the tenant by execution, after the leases ended, shall hold over, and have no aid of this statute. Co. Litt. 289. b.

This statute enacts, that *if hereafter any* * *such lands, tenements, or hereditaments, as be,*

* This has *relation to the preamble*,

where there are rehearsed four kinds of executions of those lands, &c. 1st, Upon judgments; 2dly, Upon statutes merchant; 3dly, Statutes of the staple; 4thly, Recognizances. These recognizances be of two sorts; one, usual recognizance taken in any of the king's courts of record at Westminster; another in nature of a statute staple, by the statute of 23 H. 8. cap. 6. This *conusee of the statute staple hereafter in this statute is called obligee*, because in them both the seal of the party is put, and the tenant by elegit upon judgments and recognizances shall hold the land, &c. until he be answered his debt without mises, costs, &c. But tenant by statute merchant, tenant by statute staple, or by recognizance in nature of a statute staple, shall hold the land, &c. until his debt be paid, together with mises, costs, &c. 2 Inst. 678.

*Or shall be* † *had and delivered to any person or persons in execution as is aforesaid.*

† The word *had*, is *by elegit* upon judgments or recognizances, to have the moiety in execution. 2 Inst. 678. ——— *Delivered*, is *by liberate* upon the other three, upon the whole land, &c. of the conusor; *but after the extent in* those three *cases (of the statutes, or recognizances in nature of a statute) returned*, the *conusee may enter* without any delivery by the sheriff by force of the liberate; and he that so enters without any delivery is within the aid and benefit of this act, which speaks of delivery. 2 Inst. 678.

‡ *Upon any just and lawful title, matter, condition, or cause wherewithal the said lands, tenements, and hereditaments were liable, tied, and bound, at such time as they were delivered and taken into execution,*

‡ That is, upon some *former* just and lawful *title*, &c. before the judgments, statutes, or recognizances. 2 Inst. 678.

‖ *Shall happen to be recovered, lawfully devested, taken or evicted out of and from the possession of any such person and persons as now have and hold, or hereafter shall have and hold the same in execution as is aforesaid, without any fraud, deceit, covin, collusion, or other default of the said tenant or tenants by execution,*

‖ By the context of this law *the whole land*, &c. had in execution, and the whole interest of the land in execution, *must be* recovered, devested, or *evicted*, for the reasons and causes there expressed. 2 Inst. 678.

§ *Before such time as the said tenants by execution, their executors, or assigns,*

§ Here are *administrators*, and so through the whole act, *understood*, because they are in equal mischief, and likewise and for the same reason, albeit assignees be named in this branch; yet they are implied throughout this act in branches necessary, where they are not named. 2 Inst. 679.

A man makes a lease for years, rendering rent, the lessor ousts the lessee and binds himself in a statute, the land is extended, and delivered to the conusee, the lessee re-enters, this is no eviction within this statute; for it appears by the preamble, that the conusee must be clearly without remedy, &c. but here the conusee shall have the rent reserved, and the reversion. 2 Inst. 679.

[ 34 ]

¶ *Shall have fully and wholly levied or recovered the said whole debt and damages,*

¶ Although the conusee have received the whole debt by execution upon the statute merchant, statute staple, or recognizance in the nature of a statute staple, yet cannot the conusor enter; for he must hold the land until he be satisfied, not only

only of his debt but of his coſts, damages, labours and expences; otherwiſe it is in caſe of elegit, as has been ſaid, for there, after the debt ſatisfied, the conuſor may enter; for tenant by elegit holds the land but until the debt is ſatisfied. 2 Inſt. 680.

5thly, This ſtatute muſt *not be taken literally*, but according to the meaning; therefore where the letter is until he, &c. or his aſſigns ſhall fully and wholly have levied the whole debt or damages; if he has aſſigned ſeveral parcels to *ſeveral aſſigns*, yet *all they ſhall have the land, but till the whole debt be paid.* Co. Litt. 289. b.

* Theſe words are not to be taken literally, but according to the meaning of the makers of this law, and ever ſuch conſtruction is to be made, as the party grieved, and in equal miſchief may be relieved: and therefore if a ſeigniory conſiſting of fealty and rent be delivered in execution, and after the rent became leck by ſurpluſage, and after is evicted, he ſhall have the remedy of this ſtatute; but if a villain be delivered in execution, and the villain purchaſe land in fee, and the tenant by execution enter into the perquiſite of the villain, and after it is evicted, he ſhall have no remedy by this ſtatute; the cauſe is apparent. 2 Inſt. 680.

* *For the which the ſaid lands, tenements, and other hereditaments* † *were delivered and taken into execution, as is aforeſaid:*

6thly, Where the words be (for the which the ſaid lands, &c. were delivered in execution) a diſſeiſor conveys lands to the king, who grants the ſame over to A. and his heirs to hold by fealty, and 20l. rent, and after grants the ſeigniory to B.——B. knowledges a ſtatute, and execution is ſued of the ſeigniory. A. dies without heir, and the conuſee enters, and is evicted by the diſſeiſee, he ſhall have the aid of this ſtatute; and yet it is out of the letter of the law, for the ſeigniory was delivered in execution, and not the tenancy; but he was tenant by execution of thoſe lands; and therefore within the ſtatute. But the perquiſite of a villein being evicted is out of the ſtatute, for he is tenant in fee ſimple thereof, and not tenant by execution. Co. Litt. 280. b. 290. a.

† 7thly, Where the words be (delivered and taken in execution), yet if after the liberate the conuſee enters (as he may) ſo as the land is never delivered, yet is he within the remedy of this ſtatute, for he is tenant by execution. Co. Litt. 290.

‡ If judgment and execution be awarded in the court of C. B. and in a writ of error the judgment is affirmed in B. R. the tenant by execution may upon eviction have a ſcire facias out of B. R. for it is the ſame court in equal miſchief to the party grieved. 2 Inſt. 680.

‡ *Then every ſuch recoveror, obligee, and recognizee ſhall and may have and purſue a writ of ſcire facias out of the ſame court, from whence the ſaid former writ of execution did proceed againſt ſuch perſon or perſons as the ſaid writ of execution was firſt purſued, their heirs, executors or aſſigns of ſuch lands, tenements, or hereditaments, as were or had been then liable or charged to the ſaid execution returnable into the ſame court at a certain day, being full* 40 *days after the date of the ſame writ.*

8thly, Where the ſtatute ſays (then every ſuch recoveror, obligee and recognizee ſhall, &c.), and ſays not, their executors, adminiſtrators, or aſſigns, but they are omitted in this material place, yet by a benign interpretation this ſtatute ſhall extend to them, becauſe they are mentioned in the next precedent clauſe of the eviction, and the remedy muſt by conſtruction be extended to all the perſons that appear by the act to be grieved; a point worthy the obſervation. Co. Litt. 290. a.

9thly, Where the ſtatute gives a ſcire facias out of the ſame court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted ſhall have a ſcire facias by the equity of this ſtatute out of that court, becauſe the ſcire facias muſt be grounded upon the record, et ſic de ſimilibus. Co. Litt. 290. a.

10thly, Where the ſtatute gives the ſcire facias againſt ſuch perſon or perſons, &c. that were parties to the firſt execution, their heirs, executors, or aſſigns, &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor, &c. ſo as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no ſcire facias ſhall be awarded againſt him, his heirs, executors, or aſſigns; but if he has other lands ſubject to the execution, then a ſcire facias lies againſt him or his aſſigns, but not againſt his executors; neither in that caſe can he have a ſcire facias upon the ſtatute againſt the firſt debtor or recognizor, becauſe it gives it only againſt him, &c. that was party to the firſt execution, his heirs, executors, or aſſigns; but if there be ſeveral aſſigns of ſeveral parcels of lands ſubject to the execution, one ſcire facias upon this ſtatute ſhall lie againſt all the aſſigns; ſed eſt modus in rebus. This little taſte ſhall give a light to the diligent reader, not only to ſee into the ſecrets of this ſtatute, but into others alſo of the like nature. Co. Litt. 290. a.

[ 35 ] *At which day the defendant being lawfully warned, make default, or appear and do not ſhew and plead a ſufficient matter or cauſe, other than*

*than the acceptance of the ſaid lands, tenements and hereditaments, by the ſaid former writ of execution, to bar, avoid, or diſcharge, the ſaid ſuit for the reſidue of the ſaid debt and damages remaining unlevied, or unreceived by the ſaid former execution; then the Lord Chancellor, or other ſuch juſtice or juſtices, before whom ſuch writ of ſcire facias ſhall be returnable, ſhall make eftſoons a new writ or writs out of the ſaid former record of judgment, ſtatute merchant, ſtatute ſtaple, or recognizance of like nature and effect as the ſaid former writ of execution was, for the levying of the reſidue of all ſuch debt and damage as then ſhall appear to be unlevied, unſatisfied, or unpaid, of the whole ſum or ſums in the ſaid former writ of execution contained; any law, cuſtom, or other thing to the contrary hereof, heretofore uſed in any wiſe notwithſtanding.*

8. The *conuſee of a ſtatute-ſtaple died*, his *executors ſued an execution* in the Chancery, and the *ſheriff returned* on the inquiſition, that the conuſor was dead, and alſo *an inquiſition of an extent of the lands* of the conuſor, *but did not mention any certain eſtate*, but generally that he was ſeiſed the day of the recognizance of the manor of Brod. where the name of the manor is Bor. without ſhewing what eſtate, &c. and yet a liberate iſſued upon this return, and was returned ſerved, viz. that the executors had accepted this according to the extent. The opinion of the juſtices ſhewn to the Ld Keeper was, that the executor, or the executor of the executor, if he received no profit of it, may pray a re-extent upon this inſufficient and uncertain return; for the firſt was void; for (ſeiſitus) may be pro termino vitæ, or in fee tail; in which caſe the land after his death is not extendible, and therefore where the death of the conuſor appears on the return, it *ought to be found that he was ſeiſed in fee only*. Dyer, 299. a. pl. 31. Paſch. 13 Eliz. Anon.

9. If execution be had on a *puiſne ſtatute*, and the ſame is afterwards *avoided by a more ancient ſtatute*, and afterwards the ancient ſtatute is ſatisfied, the puiſne recognizee may *re-enter* without ſuing forth any new execution; per Manwood Ch. B. 3 Le. 239. pl. 328. Mich. 32 & 33 Eliz. in the Exchequer, in Curſon's caſe.

10. If *part of the land* be *evicted*, the party ſhall not have remedy upon the ſtat. 32 H. 8. cap. 5. per Coke Ch. J. to which Crook J. agreed. And the Court held it to be no difference, though the *judgments* were *given in ſeveral courts againſt ſeveral perſons, and at ſeveral times*, and where it is but *one judgment againſt one perſon*. Godb. 258. in pl. 355. Paſch. 12 Jac. B. R.

11. If a latter extent be *avoided* by an ancient extent, after the ancient extent be ſatisfied the latter extent ſhall have the land according to his firſt extent, and without any re-extent. Brownl. 39. Mich. 10 Jac. Anon.

12. If execution be lawful, and *upon lawful proceſs*, and the party is delivered out of execution, then he ſhall not be taken again in execution; *but* if he is taken in execution *upon erroneous proceſs*, and he is delivered out, *he may be taken again in execution*, for the firſt execution was erroneous, and is no record, it being reverſed; Palm. 447. S.C. & S.P. per Curiam. —— Lat. 192. S. C.

reverſed; per Doderidge J. Godb. 372. pl. 461. Paſch. 3 Car. B. R. in caſe of Fiſh v. Wiſeman.

13. Judgment againſt the defendant in C. B. and *after the year a ca. ſa. was awarded without a ſci. fa.* and the defendant taken, who brought a *writ of error* in B. R. and the *defendant was diſcharged*; afterwards the *plaintiff ſued out an alias ca. ſa. without a ſci. fa.* and the ſheriff *returned cepi*, and thereupon the defendant moved to be diſcharged, becauſe he being once in execution and let at large, ſhall not be in execution again, but held, that being not lawfully in execution and *the execution being reverſed, he may be taken in execution again.* Lat. 192. Hill. 2 Car. Wiſeman v. Fiſh.

[ 36 ]

Keb. 785. pl. 33. Loveleſs v. Ratcliff, S. C. and if there be agreement to deliver poſſeſſion in futuro, if it be denied, a new writ may be had, but after the year there muſt be a motion for it in court. ——— Sid. 224. pl. 15. Mich. 16 Car. 2. B. R. Anon. ſeems to be S. C. and is, viz. nota, that hab. fac. poſſeſſions ſhall not be granted after the year after the judgment without motion in court; and if it be once executed, though the parties are turned out immediately by a trick, yet they cannot have a hab. fac. poſſeſſionem without motion in court. ——— S. P. and ſame diſtinction as in Keb. ſupra, per Holt Ch. J. Ld. Raym. Rep. 482. Trin. 11 W. 3. in caſe of the King v. Harris.

14. After an *hab. fac. poſſeſſionem* executed, be it by ſheriff or voluntary delivery of poſſeſſion, if the *party be turned out again by defendant's means*, he may have a new hab. fac. poſſeſſionem by motion in court, and attachment againſt him. But *if after quiet poſſeſſion others enter*, he muſt have new action or reſtitution, or elſe by this means by practice the ſheriff may turn out any of his after-leſſees on nonpayment of rent. Nota pro regula. Keb. 779. pl. 22. Mich. 16 Car 2. B. R. Ratcliff v. Tate.

Cogniſor of ſtatute ſtaple had lands in ſeveral counties, and cogniſee extended in one county only, and the extent was returned and filed. Ld. C. Macclesfield, upon a petition, gave leave that a ſpecial prayer be entered on the record of the extent, ſhewing that the cogniſor died ſeiſed in fee of lands in ſeveral other counties, viz in S. N. &c. and praying that the cognuſee be at liberty to ſue out extents upon the lands in all thoſe counties. 2 Wms.'s Rep. 91. Hill. 1722. Oats leſſee of Joliff v. Robinſon.

15 It ſeems there ſhall be no *re-extent on ſtatute-ſtaple* after the extent filed. Sid. 356. Hill. 19 & 20 Car. 2. B. R. Anon.

16. In *debt upon a judgment*; the defendant *pleaded, that he was taken upon a ca. ſa. and committed to the marſhal* of B. R. *and* that he *had paid the money to him in ſatisfaction* of the judgment. Adjudged no plea, becauſe the marſhal has nothing to do to receive the debt, but to detain the defendant in priſon till he has paid the plaintiff. 2 Lev. 203. Trin. 29 Car. 2. B. R. Tailor v. Bekon.

17. *Bill* to have *a ſtatute* re-extended on other lands; defendant who was an incumbrancer of thoſe other lands *pleads* the former extent, and an inquiſition and liberate, and avers it to be one and the ſame ſtatute. Plea allowed. Fin. R. 287. Hill. 29 Car. 2. Wolmer v. Bendiſh.

18. By acceptance of lands on a *liberate* plaintiff is concluded to have other execution againſt the goods. 3 Lev. 269. Paſch. 2 W. & M. in C. B. Barker v. Dye adminiſtrator of Dye.

## (U. a. 4) After Delivery by Parliament.

1. ONE in execution had a writ of *privilege of parliament*, upon which the ſheriff ſets him at liberty, yet he ſhall be taken in execution again after the parliament is ended. Godb. 373. by Hyde Ch. J. cites Dyer, 59, 60. [Paſch. 37 H. 8.] Trewinyard's caſe.

Lat. 193. S. C. cited by Doderidge J.— Palm. 448. S. C. cited by Doderidge.— —

Heath's Maxims, 279. cites S. C. and ſays it was reſolved, firſt, That the privilege was grantable, notwithſtanding the execution; becauſe the king and realm have an intereſt in the body of every burgeſs of parliament, and the commonweal ſhall be preferred before the intereſt of any private perſon. Secondly, That after the parliament ended, he might be taken in execution again; for that the plaintiff ſhall not be prejudiced in his execution by the act of the law, which doth wrong to no man.

[ 37 ]

2. 1 *Jac.* 1. *cap.* 13. *ſ.* 1, 2. *If any perſon being arreſted in execution, and by privilege of either houſe of parliament ſet at liberty, the party at whoſe ſuit ſuch execution was purſued, his executors or adminiſtrators, after the privilege of that ſeſſion of parliament, in which ſuch privilege ſhall be granted, ſhall ceaſe, may ſue forth a new writ of execution, as if no ſuch former execution had been ſerved. And no ſheriff or officer, from whoſe cuſtody ſuch perſon arreſted ſhall be delivered by privilege, ſhall be charged for delivering out of execution any ſuch perſon by privilege of parliament ſet at liberty.*

*S.* 3. *This act ſhall not diminiſh any puniſhment, to be by cenſure in parliament inflicted upon any perſon, which ſhall make or procure ſuch arreſt.*

3 In an *account* againſt B. judgment was given quod computet, and before the auditors, he makes an uncertain account, and was *committed till he had made a full and perfect account*, and after B. was delivered by privilege of parliament; proceſs was prayed to retake B. and to bring him again into the court, and it was thought not to be within the ſtatute of 10 Jac. becauſe B. was not in execution, nor for any certain duty. And by the Court a new cap. ad comput. ſhall not iſſue, for then all that was done before the firſt auditors will be annulled, as 1 E. 5. 1. b. But *a ſpecial writ ſhall iſſue*, reciting all the matter, and to bring him again into court, and being there he *ſhall be committed to priſon* by the Court, *there to remain until*, &c. ut ſupra, which was done accordingly. Noy, 17. Breerton's caſe.

## (U. a. 5) After Dying in Execution.

1. IN *debt* it was agreed arguendo, that if a *man takes a body in execution by ca. ſa.* and the *party dies in priſon*, he ſhall not have execution, but if he *eſcapes*, the party ſhall have account againſt the warden; per Priſot. Br. Execution, pl. 8. cites 33 H. 6. 47.

2. 21 *Jac.*

2. 21 *Jac.* 1. *cap.* 24. *The parties at whoſe ſuit any perſon ſhall ſtand charged in execution for any debt or damages recovered, their executors or adminiſtrators may, after the death of the perſon ſo charged, and dying in execution, have new execution againſt the lands and tenements, goods and chattels, of the perſon ſo deceaſed, as they might have had if ſuch perſon had never been in execution.*

3. S. 3. *This act ſhall not give liberty to any perſon at whoſe ſuit any ſuch party ſhall be in execution, and die in execution, to have any new execution againſt any lands or hereditaments of ſuch party dying in execution, which ſhall after the ſaid judgment be by him ſold bona fide for the payment of any of his creditors, and the money which ſhall be paid for the lands ſo ſold, either paid or ſecured to any of his creditors in diſcharge of their debts.*

[ 38 ]
Fol. 904.

## (X. a) What Execution may be after other.

### After Capias or Fieri Facias.

[1. AFTER *a fieri facias prayed of record* he may have an *elegit*. Contra 27 E. 3. 89. b.]

Fitzh. Execution, pl. 126. cites S. C. ——— S. P. Br. Elegit, pl. 20.

[2. After a *fieri facias returned nihil*, an elegit lies. 30 E. 3. 24.]

† Br. Execution, pl. 64. cites S. C. ——— ‡ Br. Elegit, pl. 5. cites S. C. ——— Br. Execution, pl. 128. cites S. C. ——— Fitzh. Execution, pl. 123. cites Hill. 50 E. 3. S. P. and ſeems to intend S. C.

[3. After a *fieri facias* he may have an *elegit*. † 15 H. 7. 15. ‡ 47 E. 3. 26. b.]

Br. Execution, pl. 72. S. P. cites 21 H. 7. 19. —— Br. Exigent, pl. 40. cites S. C. ——— Het. 159. S. P. though part of the debt is ſatisfied. Hill. 5 Car. C. B. Cave v. Fleetwood.

[4. So after a fieri facias he may have a *capias*. 15 H. 7. 15. 21 H. 7. 19. b.]

Fieri facias iſſued to levy 20 l. the ſheriff returned quod levavit 10 l. & quod non habet plura bona, by which the plaintiff had other fieri facias, upon which the ſheriff returned quod nihil habet, by which the plaintiff prayed ca. ſa. and had it for the reſidue; quod nota. Br. Executions, pl. 101. cites 18 E. 4. 11.

[5. If a man recovers debt againſt B. and *levies part* of the debt *by fieri facias which is returned*, yet he may *take the body* of B. in execution by a capias *for the reſidue* of the debt. M. 4 Ja. B. R. per Cur. reſolved between CARR AND COPPING.]

In debt the plaintiff recovered 400 l. and upon a fieri facias 100 l. was levied and returned. Afterwards a cap. ad ſatisfaciendum iſſued for the whole 400 l. whereas it ought to have been only for the remaining 300 l. and the judgment of execution was reverſed; for the levying the 100 l. was returned of record upon the fieri facias. Mo. 598. pl. 819. Mich. 34 & 35 Eliz. Wells v. Denny. —— Cro. E. 344. pl. 15. Dennis v. Wells. Mich. 35 & 36 Eliz. S. C. held accordingly, that it ought to have made mention of the money levied before.

[6. If *two are bound jointly and ſeverally, and judgment* given againſt them *upon ſeveral præcipes*, the plaintiff ſhall not have a *fieri facias againſt one, and a capias ad ſatisfaciendum againſt the other*,

*other*, but ought to have *but one manner of execution againſt both.* M. 11 Ja. B.]

[7. If a *capias ad ſatisfaciendum be awarded*, though the ſheriff returns a *non eſt inventus*, yet he ſhall not have other execution after. 20 E. 2. Execution, 132.]

[8. If a man *recovers debt or damages* againſt B. and after B. *is put in execution for this upon his prayer*, he ſhall not after have an *elegit* or *fieri facias* againſt him for it. 22 Aſſ. 43. 47 E. 3. Execution, 41. he ſhall not have elegit.]

Br. Execution, pl. 79. cites S. C. for the taking of the body at his ſuit or prayer is full execution.

[9. If a man recovers debt againſt B. and after B. is put *in execution by* force of a *capias ad ſatisfaciendum*, the plaintiff has determined his election, ſo that he cannot after have an elegit or fieri facias. M. 43 and 44 Eliz. B. R. per Cur.]

And though he ſues out a capias and fieri facias at the ſame time, yet if the defendant be taken on the ca. ſa. the Court will quaſh the fieri facias. For per Cur. though * plaintiff may for his own ſecurity take out 2 writs, yet he can execute but one. 8 Mod. 302. Trin. 10 Geo. 1725. Stamper v. Hodſon.

*[ 39 ]

[10. If A. be taken in *execution upon a capias ad ſatisfaciendum* at the ſuit of B. and *eſcapes from the ſheriff, and no return* is made *of the writ nor is it filed, nor any record* made *of the award of the capias*, B. may have a *ſcire facias* againſt A. upon the judgment, and ſo after have *elegit or any other writ.* P. 8 Car. B. R. adjudged upon a demurrer between Sir Robert Mounson and Clayton.]

[11. *So* if A. be taken in execution upon a capias at the ſuit of B. and *eſcapes* from the ſheriff, *and all this is pleaded and confeſſed upon a demurrer*, but it is *not pleaded that the capias was filed or returned*, B. may have new ſcire facias againſt A. to have execution, and ſo after have elegit or any other writ. P. 8 Car. B. R. between Sir Robert Mounson and Clayton, adjudged upon a demurrer, the which intratur Tr. 7 Car. Rot. 1343. I myſelf being of defendant's counſel.]

12. In falſe impriſonment the defendant was condemned in damages, and *fieri facias* awarded and *returned nihil*, and therefore *ca. ſa. iſſued*; quod nota, that upon return of nihil a capias lies after fieri facias. Br. Execution, pl. 19. cites 45 E. 3. 19.

S. P. Br. Execution, pl. 64. cites 15 H. 7. 14, 15.— S. P. Br. Elegit, pl. 20. cites tit. Elegit in the old tenures. ——S. P. Br. Exigent, pl. 13. cites 45 E. 3. 19.

13. Sheriff on a fieri facias *levies the money and delivers it to the party*, yet if it be *not paid in the court*, the party may have a new execution, and it is no plea to ſay that he paid the ſame to the party; for it is *not of record* with paying the money in court. Godb. 147. pl. 188. cites 11 H. 4. 50.

14. If a man takes elegit, he ſhall not have † *ca. ſa.* nor ‡ *fi. fa.* after; per Davers; and this ſeems to be *where the elegit is ſerved.* Br. Execution, pl. 8. cites 33 H. 6. 47.

† S. P. and this where a man takes elegit, and the ſheriff returns that the defendant has no goods nor land after, &c. by which he prayed capias, and could not have it. Ibid pl. 64. 15 H. 7. 14, 15. ‡ S. P. Ibid. pl. 93. cites 5 E. 4. 41. —— S. P. Br. Elegit, pl. 20. cites Old Tenures tit. Elegit.

15. *Detinue*

15. *Detinue of a box of evidences;* the *plaintiff died after judgment and before execution,* and by award the *executor ſhall have fieri facias for the damages and diſtringas for the box and evidences,* upon which the *ſheriff returned iſſues* 13*s. and upon the fieri facias quod cepit grana ad valenc'* 60*l. ad quod non invenit emptores,* and *the damages were* 80*l. and that the defendant had no lands, tenements, nor goods, upon which to make execution,* by which the *Court awarded capias for the reſt of the damages, and* writ of *venditioni exponas* to ſell the grain, *and capias to deliver the box and evidences* againſt the defendant. Br. Execution, pl. 103. cites 20 E. 4. 3.

16. Note, per Fairfax, in a caſe of a ſtatute ſtaple, where a man *recovers debt or damages, he may chooſe to have ca. ſa. or elegit,* and if he *takes the ca. ſa.* he *ſhall not have elegit.* Br. Execution, pl. 64. cites 15 H. 7. 14, 15.

17. Upon a *ca. ſa.* to the ſheriff of Middleſex, he made a *precept to the bailiff* of the liberty of the dutchy of the Savoy, *to take the debtor ad reſpondend' the plaintiff* when it ſhould be ad ſatisfac', and the *bailiff returned the precept executed,* and the *ſheriff returned a cepi corpus ſecundum exigentiam brevis.* Though the ſheriff had by this means charged himſelf to the plaintiff ſo as he might demand execution againſt him, yet becauſe the defendant was never [40] taken in execution for the debt, but was taken only ad reſpondend', the *plaintiff may take new proceſs* againſt the defendant. Yel. 52. Mich. 2 Jac. B R. Wood v. Holborn.

18. Judgment in *debt upon ſeveral præcipes* was had againſt two; *one* of them *was taken upon a ca. ſa.* and afterwards a *fi. fa. iſſued againſt the other;* but the Court held it clearly, not to be good, but that he *might have a capias againſt both,* but not a fieri facias againſt one, and a ca. ſa. againſt the other. Godb. 208. pl. 296. Mich. 11 Jac. C. B. Roffer v. Welch and Kemmis.

19. Two were *bound in a bond jointly and ſeverally,* and *plaintiff brought ſeveral præcipes againſt them, and had ſeveral judgments* againſt them, and took out a fieri facias againſt one, and a ca. ſa. againſt the other; Hutton J. held, to which Harvey J. agreed, that he ſhall have the ſame execution againſt both; for as this ought to be one ſatisfaction quoad ſatisfactionem, ſo it ought to be for the manner alſo, and thought that in this caſe the capias was not well awarded. Win. 112. Mich. 22 Jac. C. B. Holt v. Holt.

20. If on a fieri facias *all the money is not levied,* the writ muſt be returned before the ſecond execution can be taken out; for that muſt be grounded on the firſt writ, and *recite* that all the money was not levied of the firſt. 1 Salk. 318. pl. 1. Paſch. 1 W. & M. B. R. Oviat v. Vyner.

21. A man ſhall have a *fi' fa' in infinitum* till the debt be ſatisfied, with this difference, that the *laſt muſt always recite the former, and what is levied* by them, that the defendant may not be overcharged; per Northey, 12 Mod. 356. Paſch. 12 W. 3. B. R. Pullen v. Purbeck.

22. If one *levy part* of his debt by *fieri facias,* he cannot after take a *ca. ſa.* for the whole, but his way is to return the fi. fa. by which

which it may appear how much is levied, and then take a *ca. ſa. for the reſidue*, per Cur. 6 Mod. 223. Mich. 3 Ann. B. R. Anon.

23. An *action* was laid *in the county of S.* and the plaintiff had judgment, and took out a *fieri facias* directed *into the county of W. without a teſtatum*, &c. and the attorney *afterwards* perceiving his miſtake, *ſued out a teſtatum fieri facias into S. but the ſheriff had executed the firſt writ before it came, and afterwards* he executed *the other* writ. But the execution was ſet aſide; becauſe the firſt writ being executed, the ſheriff could not regularly execute the other. 8 Mod. 282. in caſe of Goddard v. Gilman, cites Mich. 1725. White v. Cornwall.

## (X. a. 2) Reſtitution awarded.

### In what Caſes.

1. IN waſte the defendant was *condemned in damages*, and his land in execution by elegit, and prayed a ſcire facias to re-have his land, upon *ſurmiſe that all is paid except* 10*s. which he tendered to the Court*, and had it. Br. Elegit, pl. 3. cites 44 E. 3. 14. Finch. and Mowbrey ſaid, that it may be the land is ſown. Per Thorp, this does not appear to us, and therefore the * plaintiff ſhall have his prayer; quod nota. Br. Scire Facias, pl. 32. cites S. C.

* The defendant in the action of waſte, who now prayed ſcire facias.

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2. A *ca. ſa. was not executed till after the day of the return*, and *after the day the writ was altered in the teſte* from tres Mich. to tres Trin. and the writ *ſo altered and unſealed was delivered to the ſheriff* of London, who made a warrant to a ſerjeant, who *arreſted the defendant* and put him in priſon, and *afterwards the writ was ſealed*; and by order of the Court the writ was received, and the defendant committed to the Fleet. D. 241. pl. 50. Mich. 7 & 8 Eliz. Anon.

3. If the *ſheriff ſells a term upon a fieri facias* and afterwards the *judgment is reverſed*, the party ſhall not be reſtored to the term, but to the money only, if the *ſale* be *without fraud*; per tot. Cur. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. B. R. Anon. 5 Rep. 90. b. Trin. 42. Eliz. in Scacc. in Hoe's caſe, S. P. per Cur. and takes a diverſity between a ſale of goods of a perſon outlawed, and of a ſale on a fieri facias, and that the reaſons of this diverſity are 1ſt, That if the ſale by force of a fieri facias ſhall be avoided by a ſubſequent reverſal of the judgment, no one will buy, and conſequently no execution will be made. 2dly, In caſe of a fieri facias the ſheriff is compellable to levy the debt of the goods, &c. of the defendant, and therefore it is highly reaſonable that it ſhall ſtand. But in the caſe of cap. utlag. the ſheriff or eſcheator is not compellable to ſell, but may keep them to the uſe of the king, and ſays, that with this accords Dyer, 363. pl. 24. and cites 3 E. 3. 51. that recompence in value upon voucher once lawfully executed ſhall not be deveſted though the demandant's title to the land which he recovered be afterwards diſaffirmed and evicted.————8 Rep. 143. a. Paſch. 8 Jac. in Drury's caſe, S. P. per Cur. and they took a diverſity between meſne acts done in execution of juſtice, which are compulſary, and acts which are voluntary.————2 Le. 92. pl. 115. Mich. 26 Eliz. B. R. in caſe of Amner v Loddington, S P. agreed per Cur.—Where the ſheriff by fieri facias ſells the term or goods of a perſon who has right, to diſpoſe of them, againſt whom judgment is given, ſuch ſale ſhall ſtand after the judgment is reverſed; and where the defendant has only a temporary right of a term, and a remainder is to others, the ſale ſhall ſtand good during ſuch temporary right. Jenk. 264. pl. 66. cites Amner's caſe the S. C. as that of 2 Le. 92.

4. After

4. After *judgment in ejectment*, and an habere facias poſſeſſionem, a writ of *error was brought*, and a *ſuperſedeas* granted, directed to the ſheriff, and ſhewn to him to ſtay execution, *notwithſtanding which he did execution.* This was held an apparent contempt, and a writ of reſtitution was awarded. 2 Bulſt. 194. Hill. 11 Jac. Thomas v. Owen.

5. Before execution the defendant brought a *writ of error, and the record was removed into Cam. Scacc.* but the *ſheriff levied the money on an execution taken out of B. R.* By Roll Ch. J. this being after a verdict and judgment, the writ of error is no ſuperſedeas; and ſo it is miſchievous both ways; but bid them take a ſuperſedeas quia erronice emanavit to ſuperſede the execution; for it was ill awarded; and ordered them to take the money out of the ſheriff's hands. Sty. 414. Hill. 1654. Wingfield v. Valence.

Mod. 20. pl. 52. Mich. 21 Car. 2. Anon. Twiſden J. ſaid that he had known, if a judgment be given, and there is an agreement between the parties not to take out execution till next term, and they do it before, that the Court has ſet all aſide.

6. Note for a rule, that if there be *judgment in debt by non ſum informatus with a ceſſet executio* till ſuch a day, the Court on motion will ſet it aſide, and grant reſtitution ſi, &c. *but if the judgment is entered abſolutely, and an agreement* is afterwards *made, that no execution ſhall be before ſuch a day*, yet if execution be taken out before the day, Twiſden ſaid he would not relieve it upon motion, but the *party grieved muſt bring action on the caſe.* Sid. 379. pl. 9. Mich. 20 Car. 2. B. R. Dawſon v. Bayly.

7. *Judgment* was had *in an action laid in Staffordſhire*, and the *plaintiff ſued out a teſtatum fieri facias into Worceſterſhire;* it was moved that this was irregular, becauſe no fieri facias went firſt into Staffordſhire; but non allocatur; for the fieri facias upon which this teſtatum is founded, is returned of courſe by the attornies, as originals are; if you ſearch the roll you may find one, and that is ſufficient. 2 Salk. 589. pl. 2. Mich. 7 W. 3. B. R. Palmet v. Price.

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8. If *office find* a man has 20 *acres*, when in truth he *has but* 10, and thoſe 10 *are extended*, the execution is good while it ſtands; per Holt; but he ſeemed to be of opinion he might be relieved by audita querela. 12 Mod. 357. Paſch. 12 W. 3. B. R. in caſe of Pullen v. Purbeck.

9. If writ of *error pending plaintiff dies*, and execution taken out *without acquainting the Court* therewith, it will be ſet aſide for irregularity; otherwiſe if the Court be appriſed of it; per Holt Ch. J. 12 Mod. 494. Paſch. 13 W. 3. B. R. Anon.

10. A *fieri facias* on a judgment in debt in London being *executed in Middleſex, without a teſtatum fieri facias into London*, was ſet aſide as irregular; but the plaintiff moved, that he having a judgment with *releaſe of errors* that the goods might remain in the ſheriff's hands, and not be delivered to the defendant, who was a poor man; for by that means the plaintiff would loſe his debt; but per Cur. when the execution is ſet aſide, the goods taken muſt be returned, becauſe there can be no colour for the ſheriff to detain them. 8 Mod. 282. Trin. 10 Geo. Goddard v. Gilman.

## (Y. a) What Execution may be after another.

### After Elegit.

[1. IF a man *prays an elegit, and it is entered of record,* he cannot after reſort to any other writ of execution, becauſe he has made his election. * 19 H. 6. 4. b. Tr. 15 Ja. B. R. between ANDREWS AND COPE, per Curiam, and † by the clerks of B. and B. R. that this is all the courſe within the year after the prayer. Contra Hobart's Reports, in caſe of ‡ FOSTER AND JACKSON'S CASE, 79.]

* S.C. cited by Hobart Ch. J. Hob.

† Fol. 905.

Rep. 57. in caſe of Foſter v. Jackſon, but ſays he holds the law to be clear contrary.

‡ S. C. cited per Cur. Ld. Raym. Rep. 1451. Mich. 13 Geo. and judgment according to Hobart.

[2. If a man *recovers in B.* debt or damages, *and prays an elegit, which is entered of record, and after the record is removed into B. R. by writ of error,* where the judgment *is affirmed within the year,* the plaintiff may have execution in B. R. by capias or fieri facias, becauſe it is another court than that where he had made his election before. Tr. 15 Ja. B. R. between ANDREWS AND COPE adjudged per Curiam, præter Doderidge, who ſeemed e contra.]

[3. If a man *ſues an elegit, and it is returned nihil within the year,* he ſhall have a capias after, or a fieri facias within the year. Tr. 15 Ja. B. R. between ANDREWS AND COPE agreed per Curiam and the clerks of B. and B. R. who ſaid that it is their common courſe to have it within the year after the prayer. M. 15 Ja. B. this was ſo agreed per Curiam in the ſame caſe, ‖ Hobart's Reports, 79. 47 E. 3. Execution, 41. upon elegit returned *that he had but two marks of rent,* and held that he § may have the advantage which was at the common law (it ſeems fieri facias), and ſo there held, that if he had not execution of the damages upon the firſt writ (it ſeems by this it is intended that a nihil is returned), he may have a new writ. Contra ¶ 30 E. 3. 24.]

‖ Hob. 57. cites S. C. ¶ Fitzh. Execution, pl. 126. cites S. C. held that plaintiff might ſue a ſicut alias if the tenant came to lands or goods afterwards, but that he ſhall never have a capias nor fieri facias; and Thorpe ſaid that the reaſon is, becauſe the entry is that ſuch a one came et elegit executionem ſuum de medietate, &c. the which is the moſt high execution. ——— S. P. for it is no reaſon that the plaintiff ſhall be without execution, and he cannot be well conuſant of the land, nor of the act of his adverſary, by reaſon of the ſecret alienation. Br. Exigent, pl. 40. cites 21 H. 7. 19. ——— Le. 176. pl. 247. Hill. 31 Eliz. B. R. Palmer v. Knowllis, S. P. adjudged. ——— Cro. E. 160. pl. 50. Knowles v. Palmer, S. C. & S. P. adjudged.

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[4. If a man *prays an elegit, and it is entered of record in B. and takes out the writ,* and *before the return* of it the record *is removed in B. R.* where the judgment is *affirmed within the year,* and after it is *affirmed to the Court that the ſheriff had returned his writ ſerved in Bank,* yet the plaintiff may have a capias, becauſe this allegation does not appear to the Court, and now it is impoſſible that it can be returned here, and ſo it is more ſtrong than if a nihil had been returned. Tr. 15 Ja. B. R. between ANDREWS AND COPE

COPE adjudged per Cur. præter Doderidge, who ſeemed e contra for the election upon the roll.]

Elegit as to goods is but a fieri facias. 3 Keb. 649. pl. 70. Paſch. 28 Car. 2. B. R. in caſe of Jevan v. Love.

[5. If a man *ſues an elegit, and upon this certain goods are taken in execution and ſold for part of the debt, and this returned*, yet he may have a capias after, for now this is in effect but a fieri facias, no land being extended, and ſo it is but a *nihil for land*. Hobart's Reports, 81.]

Cro. E. 160. pl. 50. Knowles v. Palmer, S.C. adjudged.—Le. 176. pl. 247. S. C. adjudged.

[6. If a man *ſues an elegit* upon a recovery, and the ſheriff *returns that he had made partition of lands of the defendant by the* 12 *jurors, but he cannot deliver the moiety* to the party *according to the writ, becauſe all* the land *is extended to another upon a ſtatute*, he may after have a capias ad ſatisfaciendum; for this return is *all one with a nihil* returned; for non conſtat by the return when the plaintiff ſhall have execution, nor can the plaintiff have any benefit by this writ of elegit, for after the extent ended he ought to have a new elegit, and not a levari facias. M. 31 & 32 El. B. R. adjudged between PALMER AND KNOWLES.]

One cannot have an elegit after a former elegit if lands are thereby found and the elegit filed; per Glyn Ch. J. Sty. 455. Paſch. 1655. cites it as adjudged in Hobart's Reports.

[7. If a *void elegit be filed*, yet after the year he may have a new elegit. M. 10 Jac. B. R.]

8. Execution ſhall be made *of the rent which the vouchee has by reverſion in tail*, and yet the *reverſion itſelf* cannot be put in execution, and there when the vouchee dies, the executor is diſcharged immediately, and the *heir in tail ſhall avoid it*. *Quære, if* he who recovered the rent ſhall have *other execution*. Br. Execution, pl. 143. cites 17 E. 3. 11, 12.

S. C. cited Hob. 57. by Hobart Ch. J. and that as to the ſaying of Kirton, it was anſwered by Belknap that they would be adviſed of that. And ſee Ld. Hobart's further remarks there.

9. *Decies tantum*, the *plaintiff recovered and had elegit*, and the *ſheriff returned nihil*, and the *defendant was taken pro rege pro exec' ſua*, and the plaintiff prayed that he may remain in priſon alſo for his execution. Kirton ſaid, no; for you have diſcharged his body by the taking of the elegit. Per Belk. we will adviſe. Br. Execution, pl. 131. cites 50 E. 3. 4.

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Br. Elegit, pl. 10. cites S.C.—S.C. cited Hob. 57. in caſe of Forſter v. Jackſon by Hobart Ch. J. as a great opinion againſt two juſtices that had granted it, and ſays that it is cited 5 E. 4. 41. to have been ſo adjudged 30 E. 3. and that 15 H. 7. accordeth, but that it ſaith that after a capias you ſhall not have an elegit; but an alias elegit or an elegit in diverſe counties one after another the plaintiff may have, as the books are 21 H. 7. 19. 4 & 5 P. & M. Dyer, 162. But theſe books notwithſtanding (whereof there is never a judgment but one, viz. 30 E. 3. cited, which he ſays he finds not) he holds the law to be clean contrary, and that where the party takes an elegit and can have no fruit of it, he may reſort to another execution, though the election be entered of record; yet 18 E. 2. Fitzh. Execution, 140. One had execution into Norfolk, and the ſheriff returned execution of half 24 acres, and the plaintiff prayed a new elegit into Suffolk but was denied all but Norfolk, which (he ſaid) is an error.

10. If a man prays elegit, he ſhall not reſort to any other execution after; for this ſhall be entered in the record, and it is at his election. Per Newton Ch. J. ad quod nemo reſpondit. Br. Execution, pl. 50. cites 19 H. 6. 4.

11. If

11. If I *recover damages againſt two, and chooſe execution againſt the one*, I ſhall not have *ca. ſa. againſt the other*, nor ſci. fa. *nor* writ of *debt*; for I cannot after change my execution. Br. Execution, pl. 8. cites 33 H. 6. 47. Per Danby.

12. Bill of *treſpaſs in B. R. paſſed for the plaintiff*, and *he prayed elegit and had it*, and it was *returned nihil*, by which ca. ſa. was granted, and per Markham Ch. J. of B. R. and J. of C. B. A man *ſhall not have ca. ſa. after elegit, becauſe it is the moſt high execution*, and the entry is, quod querens venit & elegit executionem ſuam de medietate. Br. Executions, pl. 93. cites 5 E. 4. 41. S. C. cited by Hobart Ch. J. Hob. 57.

13. And ſuch matter was adjudged M. 30 E. 3. that a man ſhall not have capias after elegit, and ſo was the opinion of Newton. 19 H. 6. *But upon nihil returned he may have elegit ſicut alias.* Ibid.

14. A man *recovered debt and damages by judgment and had elegit*, and *before the writ ſerved the year expired*, by which *he brought ſcire facias, which was returned ſerved*, and the *defendant did not come*, by which *he prayed ca. ſa.* and had it, notwithſtanding that he had elegit before; for though the elegit is given by ſtatute, yet this does not reſtrain execution which was at the common law before; per Cur. Br. Execution, pl. 99. cites 17 E. 4. 4. Br. Elegit, pl. 15. cites S. C.—— Br. Scire Facias, pl. 187. cites S. C—S. C. cited in caſe of Forſter v. Jackſon by Hobart Ch. J. in delivering his opinion in that caſe.

15. If a ſheriff *returns* upon an elegit, quod def. *nihil habet in terra ſed alii ſunt ſeiſiti ad ejus uſum*, new elegit ſhall iſſue of the moiety of the land in uſe; per opinionem Curiæ. Br. Execution, pl. 72. cites 21 H. 7. 19. S. P. Br. Elegit, pl. 11. cites S. C. Brook ſays quære by what law, it ſeems by the ſtatute 1 R. 3.

16. And per Fineux, if elegit be *returned nihil in one county*, the plaintiff may have *other elegit in another county*. Ibid. S. P. Br. Elegit, pl. 11. cites S. C.—— S. P. Ibid. pl. 22. cites 20 E. 3. and Fitzh. Proceſs, 43. but cites 18 E. 2. and Fitzh. Execution, 140. contra.

17. A man may have *ca. ſa. after elegit*; per all the juſtices. Br. Execution, pl. 72. cites 21 H. 7. 19.

18. *Several writs of elegit* may be in ſeveral counties for the *intire debt*. D. 162. b. pl. 51. Trin. 4 & 5 Ph. & M.—And plaintiff may *divide his execution*; as if a man recovers 20 l. he may in one county have an elegit for 5 l. and in another county another writ for 10 l. and for the reſidue in another county, or otherwiſe at his election. Mo. 24. pl. 83. Paſch. 2 Eliz. Worceſter's caſe.

19. After an elegit and execution thereupon *of lands* the plaintiff may have *other elegit of a term or goods*, and though the ſheriff had returned on the firſt elegit, nihil, as to goods and chattels. Mo. 341. pl. 462. Hill. 35 Eliz. B. R. Hunger v. Fry. [45]

20. A man ſued forth an *elegit upon a recognizance in Chancery*, but *nothing was done nor returned upon it*. Agreed by Popham and Fenner, abſentibus Gawdy and Clench, that he *ſhall have a fieri facias upon the ſame recognizance*, becauſe nothing was taken upon Cro. E. 608. pl. 10. Cowper v. Langworth. S. C. ad-

judged by all the juſtices for the plaintiff. the elegit. Mo. 545. pl. 724. Hill. 40 Eliz. Cooper v. Langworth.

——— See Hob. 57. in caſe of Foſter v. Jackſon. S. P. by Hobart Ch. J. and the ſeveral year-books cited and remarked upon by him.

21. S. brought debt againſt K. and recovered and had execution by elegit, and it was found by inquiſition that the *defendant was ſeiſed of the moiety of a meſſuage and lands for life, and of other lands in right of his feme.* The *ſheriff returned* that virtute brevis, &c. *deliberari feci medietatem omnium præmiſſorum, &c. viz. medietatem medietatis unius meſuagii cum pertinentiis nec non duo pomar' nec non unum clauſum vocat'*, &c. *and that he had delivered the moiety of the lands in right of his feme and his chattels, and recited* them. This extent was filed. The queſtion was, whether he might have a new elegit, inaſmuch as the ſheriff ought to have delivered to him the moiety of the moiety of the lands jointly, ſo that the tenant by elegit might be tenant in common for a quarter part with the jointenant as it was agreed, whereas here by this delivery in ſeveralty he had in effect only an 8th part; for the other jointenant may occupy the land delivered with him in common. Richardſon held, that for part of the goods and lands in right of the feme the return is good; and being filed he cannot have a new election. For if part ſhall be evicted, you cannot have a new extent upon the eſtate; but if it had been in the genitive caſe, duorum *pomariorum*, &c. it had been good. But the Court granted the plaintiff to make a ſurmiſe that the ſheriff male ſe geſſit in the execution of the elegit, and that then he ſhould have a new elegit at his peril. Litt. Rep. 77. Hill. 3 Car. C. B. Score v. Kendall.

22. The writ of elegit was, That *elegit executionem of the goods and moiety of the land;* and the *writ was ideo tibi præcipimus quod bona et catalla* of the defendant, quæ habuit die judicii redditi deliberari facias, *(omitting the words & medietatem terrarum,)* to hold the ſaid goods, and the moiety of the lands quouſque debitum levetur. The ſheriff extended the lands and goods, and delivered a moiety of the lands and returned the inquiſition. It was moved to amend the writ, (it being only the miſpriſion of the clerk,) but it was ruled that it ſhould not, and that he *ought to have a new elegit*, becauſe the inquiſition was taken without warrant. Cro. C. 162. pl. 4. Mich. 5 Car. B. R. Walker v. Riches.

23. *Lands were extended* by elegit *at the ſuit of a common perſon*, and afterward the *queen by her prerogative had the lands extended for a debt due to her*, and ouſted the tenant by elegit. Though ſhe was ſatisfied her debt, the creditor could not have a re-extent without a *ſcire facias againſt the debtor to ſhew cauſe why a re-extent ſhould not iſſue forth, the queen being ſatisfied.* Le. 272. pl. 366. Mich. 25 & 26 Eliz. C. B. Lord Stafford's caſe.

24. A man had lands delivered unto him in execution upon an elegit, ſuper quo he came into court and *ſurmiſed that the defendant had other lands in the ſame county, and prayed another elegit*, and had it. Per Popham Ch. J. if the party had taken the firſt land upon the

the delivery of the ſheriff, he cannot afterwards have a new extent; but * *if at the firſt day of the extent returned he waives it*, then *he may have a new extent*; and judgment accordingly. Cro. E. 310. pl. 19. Mich. 35 & 36 Eliz. B. R. Hanger v. Fry.

25. A. has two ſeveral judgments againſt B.—A. takes execution on his judgments, viz. *two elegits*,—by one he has *one moiety*,—by the other he has *the other moiety*; and not only the half of the ſecond moiety, and good. Becauſe both the judgments were had in one and the ſame term, which is as one day in law, and ſo they were of equal date. Hardr. 23. pl. 9. Mich. 1655. in Scace. Att. Gen. v. Andrew.

The one elegit only is returned, and that perhaps upon the other the ſheriff has levied the whole debt, yet if debt be brought in the mean time, the defendant ought to plead it if any thing be levied. Sid. 184. pl. 5. Paſch. 16 Car. 2. B. R. Glaſcock v. Morgan.

26. *Levying goods only* for parcel upon elegit is no impediment, but that he ſhall have *other elegit*, and ſhall take the lands for the reſidue, but when the elegit is ſued and lands taken and the return filed, he ſhall have no further execution. Lev. 92. Hill. 14 & 15 Car. 2. B. R. Glaſcock v. Morgan.

Sid. 184. S. C.—— S. C. cited per Curiam. 2 Ld. Raym. Rep. 1451, Mich. 13 Geo.

27. After part of the execution is ſatisfied by elegit, the plaintiff may have *debt* for the reſidue of the judgment by the common law. Quære, if he may have a *ſecond execution* upon the *firſt judgment*. Sid. 184. pl. 5. Paſch. 16 Car. 2. B. R. Glaſcock v. Morgan.

28. If one has *judgment for* 20*l.* and ſues elegit, and ſheriff returns that he has *levied* 10*l.* of his goods and chattels, and that he *has no lands*; and *after lands come to him*, plaintiff ſhall have *ſcire facias* to extend thoſe lands; for it is the extending the lands, and not the ſuing the writ, that does conclude. Per Holt. 12 Mod. 356. Paſch. 12 W. 3. In caſe of Pullen v. Purbeck.

29. Execution on a judgment was ſued by elegit, and the ſheriff *levied ſome goods in part, but returned that the defendant had no lands.* The Court all held that upon this return *the elegit was to be conſidered only as a fieri facias*, though goods were levied, and that *if the defendant had been at large, the plaintiff might have had a ca. ſa. But if any land had been extended on the elegit, the plaintiff had been bound down* to that execution. 2 Ld. Raym. Rep. 1451. Mich. 13 Geo. Lancaſter v. Fielder.

## (Z. a.) Execution.

### After Habere Facias Poſſeſſionem.

1. UPON an habere facias ſeiſinam, the *ſheriff* returned that he *offered* to the demandant *ſeiſin of a third part of the lands, by metes and bounds in ſeveralty, according to the tenor of the writ, and ſhe refuſed to accept the ſame.* The Court would not agree to grant an alias habere facias ſeiſinam at the requeſt of the demandant;

for it would be an ill precedent, and was never yet done. D. 278. b. pl. 4. Mich. 10 & 11 Eliz. Anon.

S. C. cited by Williams J. 2 Brownl. 216. Hill. 7 Jac. B. R.

* 2. All were put out of the houſe which upon diligent ſearch could be found. After *perſons lodged ſecretly expulſed the plaintiff* again; on which ſheriff returned back to give plaintiff full poſſeſſion, but was reſiſted, ſo that without peril of his life he could not. The Court awarded a *new writ*; for that the ſame was no execution of the firſt writ, and alſo awarded an *attachment* againſt the parties. Le. 145. pl. 202. Trin. 31 Eliz. B. R. Upton v. Wells.

S. P. and it was objected, that a new habere facias poſſeſſionem, ought not to be granted, becauſe it did not appear that he ever was in poſſeſſion by the writ, for it was never returned; ſed per Coke chief juſtice, it hath been often ruled that he may have a new writ, if the firſt was not returned, and judgment accordingly. 1 Roll. Rep. 353. pl. 2. Paſch. 14 Jac. B. R. Pierſon v. Taverner.

3. S. had *judgment in ejectment*, and by habere facias poſſeſſionem *was put into poſſeſſion*, and ſoon afterwards the *defendant re-entered, the writ being returned, but not filed.* Per Williams, the plaintiff cannot have a new writ of execution, but is put to his new action, and it is not material whether the writ was filed or not, for it was fully executed, for it is in the election of the ſheriff, whether he will file or return that or not. 2 Brownl. 216. Hill. 7 Jac. B. R. Style's caſe.

4. *Judgment in ejectment*, and upon an habere facias poſſeſſionem, the *ſheriff returned that he offered to deliver poſſeſſion to the plaintiff; but he refuſed* to *accept it*; it ſeems that the plaintiff cannot have [another] hab. fac. poſſ. becauſe it appears by the record that he refuſed to have the poſſeſſion. 2 Brownl. 168. Paſch. 10 Jac. C. B. Fetherſtone's caſe.

5. If *poſſeſſion* be delivered upon habere facias poſſeſſionem, or grant of execution, and it *is avoided immediately by a new force*, there the party may have a new habere facias poſſeſſionem or grant of reſtitution; *but if* after the reſtitution awarded, the party *enjoys quiet poſſeſſion*, and he be removed by a new force, there he ought to reſort to a new remedy; per Holt. 12 Mod. 268. Hill. 11 W. 3. The King v. Harris.

## (A. b.) Execution made.

### In what Caſes by the Sheriff; in what by the Coroner, &c.

1. *UPON a certificate upon a ſtatute-merchant it was returned*, that the defendant *non eſt inventus*; the *conuſee ſaid that the land lies in D. which is in the Cinque Ports, and therefore he prayed writ to the conſtable of Dover, and to the warden of the Cinque Ports*, to make execution; for the ſheriff cannot make execution there; and for this cauſe his prayer was granted to him; quod nota. Br. Execution, pl. 115. cites 21 E. 3. 49.

2. *Treſpaſs againſt three, of which the one is the ſheriff*, by which upon iſſue *proceſs iſſued to the coroners*, and *two were convicted*, and the third

third who was *ſheriff was acquitted*, and yet proceſs of execution iſſued to the coroners; for when it is once awarded to the ſheriff, and to the coroners, it ſhall never reſort from the coroners in this plea. Br. Execution, pl. 110. cites 2 H. 6. 12.

3. Execution was awarded of *lands in Durham againſt him who was ſurety for the peace in England*, and the king ſhall ſend to the biſhop of Durham, or to his chancellor, to make execution. Br. Execution, pl. 94. cites 1 E. 4. 10. [ 48 ]

## (B. b) Obſtruction or Diſturbance of Execution what is; and the Offence thereof, and how relieved.

1. *POSSESSION was delivered by hab' fac' poſſeſſ' about nine o'clock in the morning*, and *towards ſix o'clock at night the plaintiff was forcibly turned out of poſſeſſion*; and theſe matters being ſet forth by affidavits, the Court held, that upon an habere fac' poſſeſſ' it is not a complete execution till ſheriff or his bailiffs deliver poſſeſſion to the party, and are gone away; that if immediately after ſuch execution the defendant turns him out of poſſeſſion, it would be a diſturbance of the execution, for which an attachment ought to go; but here they doubted, whether, after ſo many hours diſtance, it could be looked upon as a diſturbance of execution; and therefore the rule was, to ſhew cauſe why an *attachment* ſhould not go. 6 Mod. 27. Mich. 2 Ann. B. R. Kingſdale v. Man. 1 Salk. 321. pl. 7. S. C. Curia dubitavit.

2. Upon an entry upon the plaintiff the ſame day he had execution, the Court granted *a new habere fac' poſſeſſ'*. Per Powell J. to which Holt Ch. J. anſwered, ſo they might *if the firſt executions were not returned*, otherwiſe not. Quod Curia conceſſit. 6 Mod. 27. Mich. 2 Ann. C. B. in caſe of Kingſdale v. Man. 1 Salk. 321. pl. 7. S. C. & S. P. agreed if the firſt hab. fac. poſſ. was not returned.

## (C. b) Pleadings in Bar of Execution.

1. NOTE in aſſiſe for law, that if the *conuſee of a ſtatute merchant releaſes all his right in the land to the conuſor*, yet the conuſee may ſue execution; quod nota. Br. Execution, pl. 82. cites 25 Aſſ. 7.

2. *Scire facias upon arrearages of annuity recovered in writ of annuity*; the *defendant pleaded that the plaintiff has levied it by fieri facias*, and it was admitted for a good plea, by which the plaintiff anſwered to it; and yet *payment* or *riens arrear* is no plea without acquittance. Br. Execution, pl. 18. cites 44 E. 3. 18.

3. *Executors ſued execution of damages recovered by their teſtator*, and the *defendant pleaded acquittance of the teſtator*, and writ iſſued to warn the executors *to anſwer to the acquittance*, and the writ returned ſerved, and they did not come, by which the defendant

went quit; and ſo ſee that a garniſhment returned warned is peremptory. Br. Scire Facias, pl. 44. cites 47 E. 3. 24.

4. A man *recovered debt, and* after *brought ſcire facias, and defendant had brought writ of error of the firſt judgment and alleged it,* this is no plea in bar. Br. Execution, pl. 136. cites 10 H. 6. 6.

Br. Scire Facias, pl. 6. cites S. C.

5. *Scire facias upon recovery of debt and damages;* the *defendant ſaid, that at another time the plaintiff ſued ſcire facias, and that the ſheriff levied the money;* judgment, &c. and there it is ſaid that *fieri facias is not of record before return thereof.* Br. Execution, pl. 6. cites 20 H. 6. 24, 25, 26.

[ 49 ]

6. *So upon ca. ſa.* anno 37 H. 8. and not adjudged here; but in * 21 H. 6. 5. it was rehearſed again, and there the *plaintiff was compelled to anſwer to the defendant's plea,* and ſo he did, and therefore a good plea, cites 21 H. 6. 5. And *the ſame* law it ſeems *upon a taking of the body by ca. ſa. where no writ is returned;* but it was ſaid in anno 21 H. 6. 5. that in anno † 19 E. 3. it was adjudged no plea; quære. Ibid.

* Ibid. pl. 52. cites S. C. where it is ſaid it was adjudged a good plea that the ſheriff had levied by fieri facias, and the plaintiff awarded to anſwer it, by which he ſaid that the ſheriff had not levied it, priſt; and the other contra.

† Ibid. pl. 52. cites S. C. accordingly, becauſe the roll did not make mention of it; nor did he ſhew acquittance nor tally of the ſheriff, by which execution was awarded.

7. In *aſſiſe,* the *ſeiſin and diſſeiſin was found with force,* and the *plaintiff had judgment* to recover, *and the record was ſent into C. B. by mittimus,* and after came the *defendant and pleaded a releaſe, and prayed certificate out of the Rolls,* and had it, and it was *returned tarde,* upon which came the *plaintiff* and *prayed capias pro fine regis, and had it, becauſe the releaſe is matter in fact, and the certificate is returned tarde.* Br. Execution, pl. 7. cites 33 H. 6. 20, 21.

8. *And* per Priſot, if *attaint* be ſued, yet the Court ſhall award execution upon the firſt recovery. Ibid.

9. *But in writ of error,* if it be *error apparent,* the party ſhall be let by mainpriſe; *but* if it be *error in fact triable per pais,* the party ſhall be committed to priſon till it be tried. Ibid.

10. Where a *common perſon recovers and ſues execution* by elegit, fieri facias, or capias ad ſatisfaciend', the *defendant cannot plead releaſe, but* there he *may have audita querela or ſcire facias ad cognoſcend' factum; contra againſt the king,* but to ſue ſcire facias the defendant has day in court to plead. Br. Charters de Pardon, pl. 4. cites 34 H. 6. 3. 50. & 35 H. 6. 1. 25.

11. A man condemned and *in execution for 100 l. pleaded acquittance after the laſt continuance.* Br. Execution, pl. 73. cites 21 H. 7. 30.

S. P. and a ſcire facias being brought againſt the heir to have execution he pleaded riens per deſcent, but the plea was held to come too late after judgment by nihil dicit, and the judgment ſhould be ſpecial. D. 244. a. b. Mich. 17 & 18 Eliz. Henningham's caſe.

12. *Judgment* in debt was had *againſt an heir* on the bond of his anceſtor *by nihil dicit.* The Court held that the plaintiff ſhould have no other execution but by ſpecial elegit of all the lands deſcended in fee to the heir of the ſaid anceſtor being in the hands of the defendant. D. 81. a. pl. 62. Hill. 6 & 7 E. 6. Luſon's caſe.

13. In

13. In a *ſcire facias* on a judgment in debt, defendant pleads that upon a *fieri facias* the ſheriff of L. *took divers ſheep of defendant's for the debt, and yet detains them;* and held good though he does not allege the return of the writ. Cro. E. 237. pl. 4. Trin. 33 Eliz. B. R. Mountney v. Andrews. 4 Le. 150. pl. 262. Mountjoy v. Andrews, S. C. held accordingly; for the execution is lawful though the writ be not returned, and the plaintiff has his remedy againſt the ſheriff. ——If the ſheriff keeps the goods the party may have a new execution, becauſe the other is not an execution with ſatisfaction; but if he delivers the money or goods taken in execution to the plaintiff's attorney, it is a ſufficient ſatisfaction. Godb. 217. pl. 311. Mich. 11 Jac. C. B. Strobridge v. Archer.

14. Scire facias *to have execution of land and damages recovered in ejectment;* the defendant *pleaded an entry into the land* after the judgment and before the ſcire facias, *but did not anſwer to the damages*, and therefore the plea was held ill, and judgment that the plaintiff have execution of land and damages. Cro. E. 330. pl. 5. Trin. 36 Eliz. B. R. Kent v. Sponder. [ 50 ]

15. Scire facias *to have execution of damages;* the defendant *pleaded that the plaintiff had aſſigned the damages to the queen, and the ſheriff by proceſs out of the Exchequer had extended his land*, and the plaintiff demurred, becauſe it is *not alleged that the ſheriff had returned the extent;* but reſolved that the plea was good; and that if a ſheriff levy money by a fieri facias, though he doth not return the writ the defendant may allege it in bar. Moor, 468. pl. 671. Mich. 39 & 40 Eliz. Hoe v. Belton.

16. Scire facias is a judicial writ, and properly lies after the year and day after judgment given, and is ſo called becauſe the words of the writ to the ſheriff be, quod ſcire facias præfat' T. (being the defendant) quod ſit coram, &c. oſtenſurus ſi quid pro ſe habeat aut dicere ſciat, quare, &c. So as by the writ it appeareth, that the defendant is to be warned to plead any matter in bar of execution, and therefore albeit it be a judicial writ, yet becauſe the defendant may thereon plead, this ſcire facias is accounted in law to be in nature of an action; and therefore *a releaſe of all actions is a good bar* of the ſame, and likewiſe a *releaſe of executions is* a good bar in a ſcire facias; this writ was given in this caſe by the ſtatute of W. 2. for at the common law, if the plaintiff hath ſucceeded [ſurceaſed] to ſue execution by fieri facias, or levari facias, a year and a day, he hath been driven to his new original. Co. Litt. 290. b.

17. Plaintiff had *judgment in an aſſault and battery.* The defendant after imparlance may *plead outlawry in the plaintiff in bar of a ſcire facias* brought by him. Jo. 239. pl. 3. Paſch. 7 Car. B. R. Wortley v. Savil.

## (D. b) Writ and Inquiſition. Return thereof.

1. UPON an elegit the ſheriff *returned, that he delivered to the plaintiff twenty acres, which is a moiety of all the defendant's lands per rationabile extentum;* the Court ſeemed in a manner that this was ill, becauſe he *did not return the inquiſition taken by the oath* Where execution is to be made by the ſheriff alone, it ought not

to be returned; but in the case

*of the jury*, for the sheriff himself cannot extend it; and the precedents are accordingly. D. 100. a. b. pl. 71. Trin. 1 Ma.

of an elegit, the extent being to be made by the inquest, and not by the sheriff alone, it ought to be returned, otherwise it is not good. D. 100. pl. 71. Marg. cites 5 Rep. Hoe's case, 90. a. 4 Rep. 74. Palmer's case, and 67. Fulwood's case.

2. If the sheriff *assigns dower* by writ to him directed, and does not return the writ, yet she is lawfully seised in dower; but *otherwise* it is *in a partition* by writ; *for there a second judgment ought to be given.* Cro. E. 17. pl. 8. Pasch. 24 Eliz. C. B. cited by Fenner to have been adjudged 10 Eliz. in Ashborough's case.

3. *Elegit* must be returned, but *extents upon statutes need not*; Arg. Godb. 83. Mich. 28 & 29 Eliz.

4. Where a *man is taken upon a ca. sa.* the execution is good though the writ is not returned; and so of an *habere facias seisinam*, and so *generally in all writs* of execution where either goods or lands are to be taken, *except in elegit*, and that must be returned, because the Court may judge of the sufficiency or insufficiency of the inquisition. 4 Rep. 67. a. Hill. 33 Eliz. Fulwood's case.

[ 51 ] 5. *Judgment in debt against A.* and *upon the death of A. a scire facias issued* into the county of Surry, and an *elegit in due form was sued and returned.* The *entry in the roll was of an award of an elegit medietatem omnium terrarum in com' Surry, &c. omitting quæ fuerunt prædicti A. die judicii* versus eum redditi. Although the writ of elegit and the return are good, yet the execution is erroneous because of the said omission. Jenk. 298. cites Hob. 90. [pl. 122. Mich. 5 Jac. in Cam. Scacc.] Keer's case [alias Keere v. Owen].

## (E. b) Equity.

1. AN *elegit returned and filed being out*, and thereby without remedy, was *renewed* by this Court to be executed. Toth. 146. cites 2 Car. Palmer v. Bolls.

2. To *account* for profits upon extent *according to true valuation*, and not to the extended value, but not uſe for thoſe profits. Toth. 154. cites 5 Car.

According to the receipt, and not to the extended rate. Toth. 154. cites 2 Car. Lady Deancourt v. Hampſon.

3. A *re-extent* was awarded upon a ſtatute, the *lands not being known on a former extent*. Toth. 154. cites Trin. 5 Car. Chivers v. Bampton.

4. The plaintiff ſued out an *elegit*, which *not being well laid the extent was not good*, but on a bill in equity the money was decreed. Toth. 154. 12 Car. Trion v. Michel.

Chan. Rep. 107. S. C. the Court declared, that if the defendant would have proved that any profits had been taken by the ſaid extent it would have relieved the defendant for the ſame, but failing of ſuch proof, the Court ordered him to pay the money on the bond with damages.

5. Conuſee of a *ſtatute extended it on an infant*, which was *void*, yet equity will *relieve* him afterwards. Lev. 197. Mich. 18 Car. 2. B. R. Middleton v. Shellis.

6. *Lands of a jointreſs* of the value of 500l. per ann. were extended for a debt prior to the jointure, and upon the *inquiſition* taken were delivered in execution *at a fifth part of the value*, but decreed that the intrinſic value of the premiſes by the year ſhall be accounted for ſince the death of the huſband, and be applied to the payment of the principal, intereſt, and coſts, and if not ſufficient, the jointreſs to make it good; but if more than ſufficient, then to repay to the jointreſs ſo much thereof as has been received ſince the death of her huſband. Fin. R. 197. Hill. 27 Car. 2. Jacob v. Thaſker.

For more of Execution in general, ſee **Debt, Dower, Fines and Recoveries, Judgments, Scire Facias, Superſedeas**, and other proper titles.

Fol. 906.

# Executors.

## (A) What Power the Ordinary has in Administrations.

At the common law neither the wife, child, or next of kin, had any right to a ſhare in the inteſtate's eſtate, but the ordinary was to diſtribute it according to his conſcience to pious uſes, and ſometimes the wife and children might be amongſt the number of thoſe whom he appointed to receive it, but the law entruſted him with the ſole diſpoſition of it. Afterwards, by the ſtatute of Weſtm. 2. he was bound to pay the inteſtate's debts ſo far as he had aſſets, which at the common law he was not bound to do, and an action of debt would then, and not before, lie againſt him, if he did alien the goods and not pay the debts. Then the ſtatute of 31 E. 1. cap. 11. was made, by which he was impowered to grant adminiſtration to the next of kin, and moſt lawful friend of the inteſtate; and by this ſtatute the perſon to whom adminiſtration was committed might have an action to recover the inteſtate's eſtate; for at the common law he had no remedy. But then afterwards the ſtatute of 21 H. 8. cap. 5. enacts, that the ordinary ſhall grant adminiſtration, to the widow or next of kin of the perſon deceaſed, or to both, and this was the firſt law that gave any intereſt to the wife, to whom adminiſtration being once granted, the power of the ordinary was determined, and he could not repeal it at his pleaſure, as he might at the common law; but after the making of this ſtatute many miſchiefs did ſtill remain, becauſe the adminiſtration being once committed, the perſon to whom it was granted had the whole eſtate, and the reſt of the relations of the deceaſed were undone; and therefore if his children were under age, or beyond the ſeas, and a ſtranger had got adminiſtration, it would have been a bar to them. And thus it continued for many years, the ordinary ſtill making diſtribution as he thought fit, taking only a bond from the perſon to whom he granted adminiſtration for the purpoſes aforeſaid, and ſometimes to diſpoſe of the ſurpluſage as he ſhould direct, and no prohibition was granted to remedy theſe inconveniencies till about the 12th year of king James the firſt. But now by the act of 22 & 23 Car. 2. cap. 10. a good remedy is provided againſt theſe miſchiefs, and it is ſuch which takes away the cauſes thereof, which is, that the adminiſtrator ſhall not have the whole eſtate, but that a diſtribution ſhall be made; the title of the act ſhews the meaning thereof to be for the better ſettlement of the inteſtate's eſtate, and the body of it ſhews how diſtribution ſhall be made, ſo that ſuch bonds which were uſually given by the adminiſtrator before this law, to make diſtribution as the ordinary ſhould direct, are now taken away, and other forms are preſcribed; and there can be no remedy taken upon ſuch new bonds till the ordinary hath appointed the diſtribution, ſo that in effect this act makes the will of a perſon dying inteſtate, and tells what ſhare his relations ſhall have, and it is probable that the cuſtom of London might guide the parliament in the making of this law, which cuſtom diſtributes the eſtate of a freeman amongſt his wife and children; per Pollexfen; Arg. 3 Mod. 56. 60. Hill. 36 Car. 2. B. R. in caſe of Palmer v. Allicock.

Jo. 175. Hill. 3 Car. B. R. in caſe of Jones v. Roe, S. P.

[1. AT the *common law* the ordinary could not have *action to recover* any debt of the teſtator. 18 H. 6. 23. b. Pl. Com. 277. b. Gresbrook against Fox. 8 Rep. 135. b. Sir John Needham's case.]

by three juſtices (abſente Crooke); but if the debtor would voluntarily pay it to the ordinary, then he might receive it and diſtribute it as well as other goods of the teſtator in pios uſus.

S. P. Br. Adminiſtrator, pl. 44.

[2. At *common law* he might have *treſpaſs* for goods taken out of his poſſeſſion.]

cites F. N. B. 21. (M) —— S. P. per Fineux, ibid. pl. 50: cites 11 H. 7. 12. —— F. N. B. (D) ſays that the ordinary at this day may have action in ſuch caſe, but not for taking them out of his poſſeſſion who died inteſtate, as adminiſtrators may have. —— 2 Inſt. 398. S. P.

[3. At

[3. At *common law no action* would lie *againſt the ordinary*. 18 H. 6. 23. b. Pl. Com. 277. GRESBROOK AGAINST FOX.] S. P. Br. Adminiſtrator, pl. 19. cites 11 H. 4. and ſays quod contrarium eſt.——Brook ſays it ſeems, that at common law none may * have adminiſtration but the ordinary, who ſhall be impleaded, but ſhall not implead, nor at this day. Br. Adminiſtration, pl. 44.

If the ordinary took the goods into his poſſeſſion he was liable by the common law; and the ſtatute of Weſtm. 2. cap. 19. cum poſt mortem, &c. was made in affirmance of the common law. 5 Rep. 83. a. Trin. 37 Eliz. C. B. the ſecond reſolution in Snelling's caſe.

* [ 53 ]

[4. Now *by the ſtatute Weſtm. 2. cap. 19. an action lies againſt the ordinary*. 18 H. 6. 23. b. Pl. C. 277. [b.] GRESBROOK AGAINST FOX.] If a man die inteſtate, and the biſhop will not commit the adminiſtration, action of debt lies againſt him; yet the ordinary cannot bring action, and he ſhall be named ordinary, and yet he is not bound to declare in his count how he is ordinary. Br. Ordinary, pl. 21. cites 11 H. 4. 72.

[5. But he *cannot have an action by the ſtatute*. 18 H. 6. 23. b. Pl. Com. 277. b. GRESBROOK AGAINST FOX.] Br. Adminiſtrator, pl. 19. cites 11 H. 4. 72. S. P. but the adminiſtrator ſhall have the action by the ſtatutes.——By the ſaid ſtatute of 13 *E.* 1. *cap.* 19. *it was enacted that where an inteſtate dies in debt, and the goods come to the ordinary to be diſpoſed, in this caſe the ordinary ſhall ſatisfy the debts ſo far as the goods extend in ſuch ſort, as the executors of ſuch perſons ſhould have done in caſe he had made a teſtament.*

Unleſs ſome of the goods and chattels came to the hands and poſſeſſion of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he would neither adminiſter and pay the debts and duties himſelf, nor commit them over to the kin and friends of the inteſtate that would, the common law did charge him, and ſo does this act, which is made in affirmance of it. 2 Inſt. 398.——And ſee 2 Inſt. 397, 398. for the expoſition thereof.

[6. The ordinary cannot *releaſe* any debt of the teſtator before adminiſtration granted. 18 H. 6. 23. b.] Some ſay that an ordinary may releaſe an action, and yet he can have none. Co. Litt. 202. verſus principium.——Keilw. 127. a. pl. 90. caſus incerti temporis. Anon. S. P. argued that he could not, but Keble held to the contrary.

[7. So a fortiori he cannot *releaſe* after adminiſtration granted. Contra 18 H. 6. 23. b.]

[8. But if *treſpaſs* be done *to the goods in poſſeſſion of the ordinary*, the ordinary may *releaſe*, and this releaſe ſhall be a good bar againſt the adminiſtrator made after. 18 H. 6. 23.]

[9. *Rot. of Parliament*, 1 *H.* 5. *numb.* 13. *King H.* 4. *made divers executors, who refuſed*, becauſe they had not ſufficient for debts and legacies, by which *diſpoſitio teſtamenti bonorum* & catallorum hujuſmodi *ad dictum conſanguineum noſtrum* (who was the *archbiſhop of Canterbury*) *tanquam ad ordinarium de jure pertineret* ac bona & catalla prædicta pro ſatisfactione & ſolutione & aliis prædictis implendis venditioni publicæ exponi deberent, &c. upon which the *king took the goods for the value, to be paid to the executors* according to the will, &c. and this ordained in parliament, that the executor ſhould not be ſued by the creditors.]

10. If after a caveat put in that *adminiſtration* ſhall not be granted, adminiſtration be granted to another, it is good. Per 3 juſtices. Roll. Rep. 191. pl. 30. Paſch. 13 Jac. B. R. Hitching v. Glover.

11. If

11. If one is intitled to have adminiſtration, and the *ordinary refuſes to grant* it, a good *action lies* againſt him; Arg. Cart. 126. cites it as the opinion of Crook and Harvey. Mich. 3 Car. 1.

Sid. 371. Trin. 20 Car. 2. B. R. S. C. and by name of Offley v. Beſt.

12. Per Keeling Ch. J. and Twiſden, a caveat is of no force to hinder the grant of *adminiſtration*; for it is not the judicial act of the Court, but *is only a memorandum* entered by a clerk in court to give caution, not any record of the Court; and this Court can as well judge of it as the delegates. Lev. 187. Trin. 18 Car. 2. B. R. Offley v. Beets.

[ 54 ] 13. *Mandamus to grant adminiſtration* to the wife of the inteſtate or next of kin, and it was ſhewed, that *there was a will pretended below, and adjudged no will*; and there being an appeal from that ſentence, which being a ſuſpenſion thereof, the rule for the mandamus was diſcharged; per Cur. 7 Mod. 143. Hill. 1 Ann. B. R. Steward v. Eddy.

14. A queſtion was, whether a man might be ſued in the ſpiritual court *for taking away the goods of the inteſtate from the adminiſtrator*, or whether a prohibition ſhould go? Reſolved, that there ſhould be a prohibition; for when the adminiſtrator is made the power of the ordinary is determined, and there being a complete remedy at common law for the adminiſtrator in an action of trover, the party would by this means be doubly haraſſed; for an excommunication could never be pleaded in bar of action of trover. By the ſtatute law the ordinary muſt grant adminiſtration, and then his power is determined, and the adminiſtrator, when put in by the ordinary, derives his power not from the ordinary but the law. 10 Mod. 21. Paſch. 10 Ann. B. R. Sadler v. Daniel.

## (A. 2.) Adminiſtrator or Executor; how conſidered.

Executors are but the miniſters and diſpenſers or diſtributors of their teſtator's goods. Wentw. Off. Executor, 88. ——— He is in the nature of one that has the cuſtody of another's goods. Wentw. Off. Executor, 113.

1. EXECUTOR is but an *attorney* for the deceaſed. Roll. Rep. 147. cites 14 H. 6. 14.

Executor, from his name is but a truſtee, he being to execute the teſtator's will, and therefore called an executor per Ld. C. Parker. Wms.'s Rep. 548. Trin. 1719. in caſe of Farrington v. Knightley. ——— And after his lordſhip ſaid, that this is the reaſon why the ſpiritual court cannot compel a diſtribution, becauſe they cannot enforce the execution of a truſt. Ibid. 549.

2. Note, that an executor *cannot be a truſtee unleſs* he have an eſpecial gift in the will, and that he may then be in truſt, otherwiſe the general truſt of an executor is *to pay debts and legacies*, and of the ſurpluſage to account to the ordinary in pios uſus. Cary's Rep. 28, 29. cites 44 Eliz. 8 June, 1602.

And if I make A. my executor and ſay no more, and A. dies inteſtate without diſpoſing in his life-time of this perſonal eſtate, my next of kin, and not the next of kin of my executor, ſhall have adminiſtration de bonis non, together with all

3. Executor is in law *teſtator's aſſignee* by the very making him executor. Wentw. Off. Ex. 100.

All my perſonal eſtate, per Ld. C. Parker. Wms.'s Rep. 553. in the ſame caſe above. He is a truſtee for a legatee with reſpect to the legacy, and this is the only reaſon why the legatee may bring his bill in equity againſt the executor for a legacy, ſuppoſing it to be a truſt; per Ld. C. Parker. Mich. 1716. Wms.'s Rep. 575, 576. in caſe of Winde v. Jekyl and Albone.

It is a fundamental rule in a court of equity, that an executor is but a truſtee; per Powis J. ſitting in Chancery in the abſence of the Ld. Chancellor. 2 Wms.'s Rep. 161. Trin. 1723.

4. Since the ſtatute of diſtributions, adminiſtrators and next of kin are like executor and legatee, or rather they are *executor and legatee in law.* Arg. 12 Mod. 621. Hill. 3 W. 3. In caſe of Blackborough v. Davis.

He has as fixed an intereſt as an executor, per Holt Ch. J. Wms.'s Rep. 43. Paſch. 1701. in S. C.

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Fol. 905.

## (B.) What Power the Ordinary has touching Teſtaments; and to prove them, &c.

[1. 1 H. 5. *ROT. Parliamenti No.* 23. *the commons pray that executors be not hereafter compelled to travel to prove* teſtament, or to carry any inventory of goods of the teſtator to the ordinaries or their officials, commiſſaries, officers, or miniſters, out of the deanery in which the goods of the teſtator are, upon pain to *forfeit treble damages.*]

4 Inſt. 335. cap. 74. cites S. C.

Fol. 907.

Anſwer to this and to the other part of the petition.

[2. The king hath charged the lords ſpiritual thereof to ordain due remedy, and if they do not, the king will have it well in memory, and cauſe to amend it in time to come.]

3. When *the king* is *made an executor* of the laſt will and teſtament of any other, the king *does appoint certain perſons to take the execution of the will upon them* (againſt whom ſuch as have cauſe of ſuit may bring their action) and appoint others to take the account. See Rot. Par. 15 H. 6. Katherine queen dowager of England, mother of H. 6. made her laſt will and teſtament, and thereof conſtituted K. H. 6. her ſole executor, and thereupon the king appointed Robert Rolleſton, clerk, keeper of the great wardrobe, John Merſton and Richard Abreed, eſquires, to execute the ſaid will by the overſight of the Cardinal, the duke of Gloc' and the biſhop of Linc', or two of them, to whom they ſhould account. 4 Inſt. 335.

## (B. 2) By whom as Executor the Probate may be; and before whom, and how.

1. TEſtament proved before the *archdeacon* or the *ſequeſtrator* is good. Contra of excommunication. Br. Teſtament, pl. 25. Tempore E. 3. Itin. North.



2. Teſtament

2. Teſtament proved before the *commiſſary* is well proved; but he cannot certify excommunication. Br. Teſtament, pl. 12. cites 7 E. 4. 14.

3. A teſtament proved *before the commiſſary of the biſhop* is ſufficient, &c. And a teſtament proved *before the ſequeſtrators of the archdeacon* of ſuch a place, and his ſeal put thereunto, is ſufficient. For all teſtaments cannot be proved before the ordinary himſelf, and properly the probate of the will does belong unto him to whom the ſequeſtration doth belong. Perk. ſ. 490.

4. A teſtament proved *before any officer of the ordinary deputed to the ſame* is ſufficient; but always when the king's court writes unto any officer ſpiritual, they ought to write unto him who is immediate officer of the Court, which is the biſhop himſelf. Perk. ſ. 491.

5. The teſtament ought always to be proved *by the executors or one of them* at the leaſt. Perk. ſ. 484.

Action by two executors and probate by one is no plea in abatement. 1 Salk. 3. Brooks v. Stroud.

6. And if there be *three executors*, and *two of them will not prove the will*, nor meddle with the goods of the deceaſed, and *the other executor proves* the will, notwithſtanding this refuſal made by the other two who were made executors, and notwithſtanding that the will * were proved by the third executor only, *yet the other two executors and either of them may intermeddle with the goods of the teſtator, and adminiſter them at what time ſoever they will*; becauſe that when the will is proved, they cannot be put out of the will; and the ſame will gives them title to adminiſter the goods of the teſtator, as well as it gives title unto him who proves the will, inſomuch as notwithſtanding that they never adminiſter, and he who proves the will will bring an action as executor of the ſame will; it behoves him to bring an action in all their three names; but they ſhall not be charged as executors before they adminiſter. Perk. ſ. 485.

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7. The *proving a will is thus*; they are to exhibit the will into the biſhop's court, and there they are to bring the witneſſes who are there to be ſworn, and the biſhop's officers are to keep the original will, and certify the copy thereof in parchment under the biſhop's ſeal of office, which parchment ſo ſealed is called the will proved. Bacon's Uſe of the Law, 67.

8. If a *lord hath probate of teſtaments made within the precinct of his manor*, he cannot prove a teſtament made out of the precinct of his manor. 2 Inſt. 231.

Mo. 145. pl. 288. S. C. but that is only as to the granting of adminiſtration, and not as to the proving of wills.

9. If where there are *not bona notabilia* in diverſe dioceſes ſo as of right the probate belongs not to the metropolitan, and yet the will is proved before him, this is *not merely void*, but is of force till reverſed by ſome *ſentence upon appeal*. Went. Off. Ex. 47. cites it as reſolved, 22 Eliz. in caſe of Veer v. Jeoffries.

Mo. 145. pl. 288. cites it as ſo held 10 Eliz. as to the

10. *But* if one *has* bona notabilia in diverſe dioceſes or in *a peculiar and a dioceſe*, a probate before the particular biſhop within whoſe dioceſe part of the goods are, is utterly void without any

reverſal. So alſo of proving in ſome peculiar. Went. Off. Ex. 47.

grant of adminiſtration, but ſays nothing as to probate of wills.

11. If there are bona notabilia *in both dioceſes* of York and Cant' and in *two ſeveral dioceſes of each province*, probate muſt be before the ſeveral metropolitans; but if bona notabilia are not in ſeveral dioceſes in either province, then probate muſt be before the particular biſhops in thoſe ſeveral dioceſes where the goods are. Went. Off. Ex. 47.

12. *But* if *in one province* teſtator had goods *in diverſe dioceſes*, and *in the other province but in one dioceſe*: in the one caſe the archbiſhop ſhall have the probate, and the particular biſhop in the other caſe. And in like manner in peculiar juriſdictions. Went. Off. Ex. 47.

13. *B. is made executor for* 10 *years, and afterwards C. is to be executor. B. proves the will*, and then *the* 10 *years expire*; the queſtion was, whether C. ought to prove the will again, or whether he might adminiſter without any other probate? and it was held by Finch, that the probate of the will by B. ſhould not determine the election of C. but that he might be at liberty to take the executorſhip upon him, or refuſe it; but if he pleaded, he might adminiſter without any farther probate. Freem. Rep. 313. pl. 385. Mich. 1675. in Canc. Anon.

An executor temporary proved the will. His executorſhip ceaſed and B.'s began. B. may ſue without other probate of the will by him.

Per Lord Keeper. Chancery Caſes, 265. Mich. 27 Car. 2. Anon.

14. A *ſmall legatee* has been ſworn to prove a will. Arg. Vent. 351. Mich. 32 Car. 2.

Vern. 254. Mich 1684. Per Lord Keeper it is uſually ſo, that where a man was a legatee, if it was an inconſiderable legacy as 5 s. (or 5 l. to a man of quality) that he ſhould nevertheleſs be a witneſs to prove the will.

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15. If an *executor dies before probate* of the will, his executor cannot take on him to prove that will, but adminiſtration ought to be granted *cum teſtamento annexo* to the reſiduary legatee, if there be any, or elſe to the next of kin, according to the reſolution, in Iſted's caſe, in D. 372. pl. 8. Vern. 200. Mich. 1683. Day v. Chapfield.

When he dies without probate, the firſt teſtator died inteſtate. Cro. J. 614. Hayton v. Wolfe. ——— And though the executor adminiſtered ſome goods, yet an immediate adminiſtration muſt be granted. Per Holt Ch. J. 1 Salk. 308. in Wangford's caſe.

16. When a will is proved *per teſtes* in the ſpiritual court, they muſt *deliver the will to the executor*, and a mandamus lies for that purpoſe if they refuſe. Per Holt Ch. J. Comb. 289. Trin. 6 W. & M. in B. R. in caſe of Cox v. Webb.

17. A *mandamus* iſſued *to grant a probate* of a will; *the ordinary returned, that the executor was a perſon abſconding, and incapax*, &c. This return was held ill, becauſe there is a will admitted, and ſince the teſtator thought him a proper perſon to be intruſted with his affairs, the ordinary ſhall not adjudge him otherwiſe upon any diſability ariſing from the common law; neither can the ordinary inſiſt upon ſecurity from the executor, becauſe the teſtator thought him ſufficient, and he hath a temporal right, which he cannot ſue for

12 Mod. 205. S. C. accordingly. —3 Salk. 162. S. C. a mandamus was granted. —— Ld. Raym. Rep. 262. S. C. accordingly.

for before probate; and there have been no precedents of this nature; and a peremptory mandamus was granted. 1 Salk. 299 pl. 11. Mich. 10 W. 3. B. R. The King v. Raynes.

Carth. 457. S. C. ruled accordingly in B. R. but says, that on a bill in Chancery the Court decreed him not to intermeddle any further than to satisfy a legacy given to himself.

18. None can prove the will *but he who is named executor* in the will. 1 Salk. 308. Mich. 11 W. 3. C. B.

19. The *ſtat. H.* 8. never intended to leſſen the juriſdiction of the eccleſiaſtical court as to the probate of wills, and to grant a *prohibition* might be inconvenient; for without probate the executor cannot ſue for debts, which by this means may be loſt and the will unperformed. As for granting it *quoad the land*, (though this was the practice heretofore, ſee 2 Roll, 315. 1 Sid. 141.) it would be vain, becauſe it is no evidence either pro. or con. in any court of law, but a proceeding coram non judice; yet it is good as to the goods. 2 Salk. 552. Mich. 1 Ann. B. R. Partridge's caſe.

20. *Wife and executrix of a Popiſh recuſant* is diſabled to prove his will, by the general clauſe of the ſtatute Eliz. 4. cap. 22. and not enabled by the proviſo. 3 Salk. 133. Mich. 3 Ann. B. R. The Queen v. Ride.

21. Prohibition was granted in a ſuit in the ſpiritual court for *revoking the probate* of a will, becauſe granted to a perſon that became a *bankrupt*. Show. 293. Trin. 3 W. & M. Hill v. Mills.

22. 25 *Geo.* 2. *Made for avoiding doubts, as to the atteſtation of wills and codicils, enacts, That if any perſon after the 24th of June 1752, to whom any beneficial deviſe, legacy, eſtate, gift or appointment of affecting any real or perſonal eſtate, except charges on lands, &c. for payment of debts, ſhall be thereby given, ſuch deviſe, &c. ſhall, ſo far only as concerns ſuch perſon atteſting ſuch execution, or any perſon claiming under him, be utterly void, and he ſhall be admitted a witneſs to the execution notwithſtanding ſuch deviſe, &c. and that any creditor whoſe debt is ſo charged, ſhall notwithſtanding be admitted as a witneſs; and that ſo ſhall any legatee who has been paid, or ſhall releaſe or refuſe his legacy upon tender thereof before he gives his teſtimony, provided that* [58] *after tender and refuſal he ſhall be barred from the legacy, but after acceptance he may retain the ſame, though the will be afterwards adjudged void; and further enacts, That legatee atteſting and dying in teſtator's life-time, or before he has received or refuſed his legacy, ſhall be deemed a legal witneſs, provided that the credit of ſuch witneſs ſhall be conſidered and determined by the Court.*

*Provided that this act ſhall not extend to any heir at law, or deviſee in a prior will or codicil executed according to the ſaid recited act, or any claiming under them reſpectively, who has been in quiet poſſeſſion for the ſpace of two years next preceding the 6th day of May, in the year of our Lord 1751, as to ſuch lands, tenements, and hereditaments, whereof he has been in quiet poſſeſſion as aforeſaid; and ſhall not extend to any will or codicil, the validity or due execution whereof hath been conteſted in any ſuit in law or equity commenced by the heir of ſuch deviſor, or the deviſee in any ſuch prior will or codicil, for recovering the lands, tenements, &c. mentioned to be deviſed in any will or codicil*

ſo

*ſo conteſted, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the ſaid 6th day of May, 1751, and which has been already determined in favour of ſuch heir at law, or deviſee in ſuch prior will or codicil, or any perſon claiming under them reſpectively, or which is ſtill depending, and has been proſecuted with due diligence; but the validity of every ſuch will or codicil, and the competency of the witneſſes thereto, ſhall be adjudged and determined in the ſame manner, to all intents and purpoſes, as if this act had never been made.*

*Provided that no poſſeſſion of any heir at law, or deviſee in ſuch prior will or codicil as aforeſaid, or of any perſon claiming under them reſpectively, which is conſiſtent with, or may be warranted by or under, any will or codicil atteſted according to the true intent and meaning of this act, or where the eſtate deſcended, or might have deſcended to ſuch heir at law, till a future or executory deviſe, by virtue of any will or codicil atteſted according to this act, ſhould or might take effect, ſhall be deemed to be a poſſeſſion within the intent and meaning of the clauſe herein laſt before contained.*

*This act to extend to ſuch of the Britiſh colonies in America, where the act of 29 Car. 2. is received as a law, &c. Provided that in the ſaid colonies, deviſes, &c. by wills made before 1 March, 1753, to be only void.*

## (B. 3) In what Court, or where, a Will may be proved.

1. *PROBATE of a teſtament does not belong to the ſpiritual court, unleſs of late time by cuſtom,* and not by the ſpiritual law. Br. Teſtament, pl. 27. cites 11 H. 7. 12. Per Fineux, and tot. Cur.

2. If a teſtament bears date in Caen, in Normandy, and be proved in England, it is *ſufficient for the executor to bring an action thereupon;* but if an obligation be dated in Caen, in Normandy, the obligee nor his executor ſhall not have an action upon the ſame, &c. Perk. ſ. 494.

3. Will *of lands in London* ought to be *inrolled in the huſtings*, and ought to be *proved by citizens*, and not by ſtrangers; per Southcote. Dal. 117. pl. 11. 16 Eliz. Anon.

4. Wills are to be proved *by preſcription in ſome manors* before the ſteward, though no lands paſs by it; as in the manor of Mansfield, and in Cowley and Caverſham manors in Oxfordſhire; and its *being proved in the ſpiritual court is but of later time, and belongs not to it of common right*, as Lindwood owns; nor is it ſo in other kingdoms. Went. Off. Ex. 43. [59]

5. *Archdeacons* in ſome places have peculiar or ordinary juriſdiction to prove wills. Went. Off. Ex. 47, 48.

6. *Will of land in England made in France* and proved there; this probate ſhall not be any countenance to the will, becauſe probate is not material in caſe of land; but if it be of *goods in England* he ſhall not have action on this probate, but ought to prove

it here. Agreed by Doderidge and Chamberlain, abſentibus aliis, in evidence to a jury. Palm. 163. Paſch. 10 Jac. B. R. Lee v. Moore.

7. But if the *goods were all beyond ſea*, it is enough that the will be proved according to the cuſtom of the country where teſtator died. Vern. 397. Paſch. 1686. Jauncey v. Sealy.

8. The *biſhop may make* a commiſſary in *every archdeaconry*, or a commiſſary *throughout the dioceſe*; per Doderidge J. Roll. Rep. 435. pl. 30. Mich. 14 Jac. B. R. in Starling's caſe.

9. The probate and ordering of wills *did belong originally to the juriſdiction of temporal courts*, where the legatees might have remedy for their legacies, as appears by Glanvil, lib. 6. cap. 6 and 7. where there is a writ to demand a legacy at the common law, and now that the juriſdiction is devolved to the eccleſiaſtical court, the common law takes notice of the remedy there for legacies, for the power of that court is regulated by theſe, and therefore forbearance of ſuit there had been adjudged a good conſideration of a promiſe; and for the ſame reaſon Hale ſaid he conceived, that if an executor of his own wrong paid legacies, the rightful executor ſhould be bound thereby, becauſe he was compellable by law to pay them. All. 40 Hill. 23 Car. B. R. in caſe of Eeles v. Lambert.

10. Prohibition was moved for, becauſe the eccleſiaſtical court proceeded to examine witneſſes there *to diſprove a will that was proved there 20 years ſince, by which lands are deviſed, and the lands are ſold*, and this to prevent a trial at law touching the title of the land directed out of Chancery. Per Roll Ch. J. they may examine the probate there, for you have libelled there to take benefit of the probate, and therefore the other party may diſprove if he can, as far as concerns any goods deviſed by the will, and therefore we will grant no *prohibition*. Sty. 346. Mich. 1652. Anon.

11. Spiritual court is *not to prove a will concerning the guardianſhip of a child*, which is a thing conuſable here in B. R. and to be judged whether it be deviſed purſuant to the ſtatute. Vent. 207. Paſch. 24 Car. 2. B. R. Lady Cheſter's caſe.

12. A prohibition was prayed to the eccleſiaſtical court becauſe they did ſuffer the probate of a *nuncupative will*, whereas the *teſtator did not bid three witneſſes take notice, according to the act*. North Ch. J. ſaid, that a prohibition ſhall be granted, becauſe they proceeded contrary to the act. But the other three juſtices contra; becauſe they have proper juriſdiction of the probate of wills, and if they proceed not according to their rules the party ought to appeal. Freem. Rep. 297. pl. 351. Trin. 1679. C. B. Wildbow v. Dawſon.

Dolben ſaid, that Henſloe's caſe is not law; for no man can ſhew the contrary when it began. It is by the ſpecial law and cuſtom of England. Show. 150.

13. Eccleſiaſtical courts have *juriſdiction of wills* and teſtaments, but *not per commune jus, but by preſcription*, and no act of parliament is to give them juriſdiction; but it is ſaid in HENSLOE'S CASE, and ſo in Selden, that it was given to them by the laws of the kingdom, and it is not ſo any where but in England; per Holt Ch. J. 6 Mod. 204. Trin. 3 Ann. B. R. in the caſe of the Queen v. London.

14. Will concerning perſonal eſtate was proved in ſpiritual court; reſpondent having a former will in his favour, brings his *bill to diſcover by what means the latter will was obtained*, and to have an account of the perſonal eſtate, and to ſtop the waſting of it, *and whether the teſtator was not incapable or impoſed upon.* Defendant demurred becauſe it belonged to the ſpiritual court only to prove the validity of wills, and the former will was not proved in the ſpiritual court, as the will in defendant's favour was. But demurred and over-ruled. MS. Tab. March 11, 1727. Andrews v. Powis.

## (B. 4) Probate of Wills concerning Land.

1. THE defendant would have the cauſe diſmiſſed becauſe it concerned the probate of a will, but in reſpect the will was made to the diſinheriſon of the plaintiff *of lands as well as of goods*, it was ordered to be examined here. Toth. 237. cites 12 Jac. Edmunds v. Edmunds.

2. In a prohibition the plaintiff ſuggeſted, that the defendant libelled in the ſpiritual court, for that his father died ſeiſed of ſuch lands, and by his will *deviſed his lands to his executors to ſell, and divers goods*, &c. and that he made the defendant executor, who ſued in the ſpiritual court to have it proved, when in truth he made no ſuch will, and a will of lands ought not to be proved in the ſpiritual court, and being at iſſue, the plaintiff in the prohibition was nonſuited; but it was inſiſted, that the defendant ought not to have a conſultation, becauſe he did *not ſet forth in his libel that the teſtator had goods*, and a will of lands ought not to be proved in that court; but adjudged that the will might be proved there quod bona, for otherwiſe he can have no actions for the goods, and as to them only a conſultation was awarded. Cro. Car. 118. pl. 11. Mich. 5 Car. B. R. Hill v. Thornton.

Cro. C. 115. pl. 7. Trin. 4 Car. C. B. Denn's caſe, S. P. and a prohibition was granted generally for both; for when it is one entire will of lands and goods, and the allegation is to revoke it intirely, it ſhall not be diſjoined in the prohibition; but if one makes ſeveral wills, the one of his land, and another of his goods, and revocation is alleged of both, there a prohibition ſhall be granted for the one and denied for the other. ——2 Sid. 141. Hill. 1658. B. R. Combe v. Combe, S. P. ruled that a prohibition ſhould be quoad; and cites Lat. 71. that ſeveral authorities are ſo. But Ibid. the reporter ſays nota, that Hill. 23 & 24 Car. 2. in B. R. and oftentimes before prohibition quoad was denied, becauſe probate there is not of any avail to the lands; and that Hale Ch. J. ſaid, that they cannot prove a will in part; for it is the whole, and not part that is the will, and therefore they denied to grant a prohibition quoad.—S. P. accordingly by Hale Ch. J. 3 Hard. 313. Mich. 14 Car. 2. in Scacc. in the caſe of HOBART v. BARROW; that of late time in ſuch caſe they have uſed to deny a prohibition becauſe the party is at no prejudice by it with reſpect to the land, the probate in the ſpiritual court being no evidence againſt him at law for the land; whereas the executor would be at a prejudice if a prohibition ſhould iſſue; for then he would be hindered from proving the will, and till then he cannot ſue for a debt due to the teſtator, by which means the eſtate may be diminiſhed. But in that caſe becauſe the plaintiff had brought his action here to try the title of the land and the validity of the defendant's will, and offered to proceed in it with effect, the court ordered a prohibition quoad the land unleſs the parties would conſent to be concluded by the probate; and ſays that the like was done in the caſe of Minſhaw v. Spicer.

Prohibition was moved for to ſtop the probate of a will (that did concern lands and goods) quoad the lands; but denied per Cur. Freem. Rep. 23. pl. 30. Hill. 1671. Anon.

3. The officers of the eccleſiaſtical courts ought not to take into their hands ſuch *wills, as contain land in them*, and if they loſe them

them they muſt anſwer it in an action for damages to the value of the land, and proof that there was ſuch a will in writing ſhall ſerve * againſt them. Clayt. 91. pl. 154. March, 16 Car. Beamſley's caſe.

4. If a will contain lands to the value of 100,000l. yet the eccleſiaſtical court may cite them to bring the original to be proved per teſtes, and this Court ought not to prohibit them; but if they will not after proof deliver back the original, then this Court will intermeddle, and a proof of the will cannot be by *copy:* for if the *original be burnt or loſt*, &c. a *copy of their regiſtry* hath been often given in evidence, but a *copy of a copy* cannot; per Jefferies Ch. J. Skin. 174. pl. 3. Paſch. 36 Car. 2. B. R. Anon.

9 Mod. 90. S. C. cited and decreed that a will ſhall not be eſtabliſhed againſt an heir at law without a trial at common law, if the heir inſiſts upon it, eſpecially where there are any lands deviſed. Hill. 10 Geo. Dawſon v. Chater.

5. Probate of a will *by the heir at law*, by judgment in B. R. and confirmed on a writ of error in the Houſe of Lords, was *avoided as to the real eſtate*, cited 8 Mod. 60. Mich. 8 Geo. as the caſe of Markham v. Montague.

One coheireſs was made deviſee of part, and the other coheireſs inſiſting in her anſwer to have the validity tried at bar, it was ordered, and though found for the will, yet no coſts were given either at law or in equity. Chan. Prec. 93. Tr. 1699. Crew v. Jolliffe.

6. A deviſee of lands being in the poſſeſſion of them, brings a *bill* to prove the will, and *prays relief;* the *heir* brings on the cauſe ad requiſitionem defendentis, and *inſiſts that the bill ought to be diſmiſſed*, becauſe no merit for a voluntary deviſee, where no debts or legacies are to be paid, to have a decree againſt the heirs; but the Maſter of the Rolls ſaid, it is the buſineſs of this Court to quiet poſſeſſions, and *gave* the *defendant a year to try the validity of the will*, and then to reſort back to the Court. Abr. Equ. Caſes, 132. Hill. 1702. Woodgate v. Woodgate.

7. *Depoſitions ſigned by the witneſſes*, though the *bill and anſwer were loſt*, may be allowed as evidence to ſupply any point where the will was ſilent, but not to contradict the will; per Parker Ch. J. at a trial at niſi prius upon a will which concluded thus, "Signed, ſealed, and delivered, by A. B. the teſtator," and then ſubſcribed by three witneſſes, and upon the depoſitions it appeared (the bill and anſwer in the cauſe were loſt) that they ſubſcribed the will in the preſence of the teſtator, but it was at three ſeveral times. 10 Mod. 15. Mich. 9 Ann. Cook v. Parſons.

8. It is a poſitive rule, that where there is any *doubt on the proofs*, a *will* will not be eſtabliſhed againſt an heir without a *trial at law*. 9 Mod. 90. 1 Hill. 10 Geo. Dawſon v. Chuter.

9. A bill brought by a deviſee of land to perpetuate the teſtimony of, and eſtabliſh the will, *ought not to be ſet down for hearing*, being only to perpetuate, and therefore *was diſmiſſed* with coſts by the Maſter of the Rolls; but he ſaid, that the plaintiff would at law have the ſame benefit of theſe depoſitions, though the bill be diſmiſſed. 2 Wms.'s Rep. 162. Trin. 1723. Hall v. Hoddeſdon.

Sel. Chan. Caſes in Ld. King's Time,

10. The plaintiff exhibited his *bill as one of the coheirs* of Sir John St. Barb, and *claimed a moiety of the eſtate by* virtue of *a ſettlement made*

*made by* one Henry St. Barb, *the grandfather of the plaintiff, and* of the now *defendant*, who *having ſet up a will* made by Sir John in favour of the ſaid defendant, and it being ſuggeſted in this bill, that the will (if any) was fraudulently obtained, it was *prayed that the deeds and writings concerning the lands* in queſtion *might be brought into court*, and the rather becauſe the defendant in his anſwer owns the ſettlement as ſet forth in the bill, and that the plaintiff is one of the coheirs of Sir John; but ſays, that John St. Barb, the father of Sir John, ſuffered a common recovery of all, or the greateſt part of * thoſe lands; and declared the uſes to Sir John and his heirs, ſo that he might lawfully deviſe the ſame by his will. And now it was inſiſted by the plaintiff, that the Court would give him an *opportunity to inſpect the* ſaid *deeds and writings*, as was done in the caſes of the EARLS OF SUFFOLK AND FERRERS, and this is but a piece of common juſtice uſually done in Canc. in favour of an heir; nay, it hath been done in the caſe of a *deviſee* who is *hæres factus*, as particularly in the caſe of the late DUKE OF NEWCASTLE'S WILL, and it ought the rather to be done in the principal caſe; for though the defendant hath proved this will as executor, yet he ſays in his anſwer, that if it ſhould be ſet aſide, there are other wills in being by which the eſtate is deviſed to him. It is admitted that the plaintiff is one of the coheirs of Sir John St. Barb, but that he brought his bill in the Exchequer, ſuggeſting the ſame matter as by the preſent bill, and that upon hearing the cauſe the bill was diſmiſſed, and now he brought this new bill in this court, and the defendant inſiſts that if the plaintiff hath any right he ſhould try it at law; and he farther inſiſts, that Sir John St. Barb was tenant in tail general, and that he levied a fine of the lands now in queſtion; ſo that if the common recovery and the deed to lead the uſes doth not avoid this ſettlement, the fine will do it effectually; and that the defendant is willing to ſhew the plaintiff all the ſettlements of the family, but not all the conveyances, counterparts of leaſes, and old deeds. Per Cur. the right of the plaintiffs at law cannot be tried without the deeds, and there can be no reaſon why the plaintiff ſhould conteſt the will before he knows whether the teſtator had power to make it, which cannot be known without the ſettlement, and the deed to lead the uſes of the common recovery; for if the plaintiff hath any right, it is by virtue of this ſettlement made by his great grandfather; and as this conteſt is between coheirs, where one ſets up a will made in his favour, and inſiſts that he is not obliged to produce the ſettlement until the will is ſet aſide, certainly there cannot be a reaſon for not producing it, becauſe the plaintiff hath no better a right to ſee it then (viz.) after the will is ſet aſide, than he hath now; therefore the beſt method is to have the deeds brought before the Court, and that the plaintiff ſhall be paid the coſts of this ſuit. 9 Mod. 99. Mich. 11 Geo. 1. Floire v. Sydenham.

2. S. C. and ſaid, it was decreed that all the opinions of counſel ſhould be produced likewiſe, not as they will be a guidance to the Court, but for the caſe on which they might be founded; for papers may in thoſe caſes be mentioned which otherwiſe might be ſuppreſſed and not come to light.

* [ 62 ]

11. Upon a bill brought by a deviſee of lands againſt the heir to perpetuate the evidence of the will; the heir anſwered and put the plaintiff to his proof, and the *heir croſs-examined one of the witneſſes*,

S.P. though the heir examined the plaintiff's wit-

neſſes and refuſed to releaſe his right. 2 Wms.'s Rep. 286. ſays it was held by the Court ſoon after in the caſe of Angel and Brown.

*neſſes*, yet the *heir ſhall have his coſts*. But it may be reaſonable that he ſhould *not* have coſts *where he examines witneſſes of his own*; per King C. 2 Wms.'s Rep. 285. Trin. 1725. Bidulph v. Bidulph.

12. Lands were deviſed by will *for payment of debts. Heir at law was a creditor, and oppoſed the will as to part of the lands deviſed*, and which the teſtator had no power to deviſe, yet he was not by this excluded from being let into the reſidue of the fund given by the teſtator for payment of debts. Per Lord C. King. 2 Wms.'s Rep. 418. Trin. 1727. Deg v. Deg.

13. Where a bill is brought to prove a will of land, *the ſanity of the teſtator muſt be proved*; otherwiſe in the caſe of a deed of truſt to ſell for payment of debts. 3 Wms.'s Rep. 93. Hill. 1730. Harris v. Ingledew.

[ 63 ]

14. The Court *never* orders a will to be proved *viva voce at the hearing* as they do a deed. 3 Wms.'s Rep. 93. Hill. 1730. Harris v. Ingledew.

15. D. K. by will deviſed an eſtate to truſtees to be by them diſpoſed of by ſale, and to diſtribute the money among her children and grandchildren as therein directed, and amongſt the reſt the ſum of 100 l. to J. K. her only ſon who was a lunatic, and made E. her daughter executrix, who ſoon after the death of the ſaid D. K. proved the ſaid will in the proper eccleſiaſtical court. On the death of the teſtatrix the lunatic had an eſtate of 100 l. a year deſcended to him, and is now under a committee appointed by the court of Chancery, and the ſaid J. K.'s children have been educated and maintained by the ſaid E. and have not any other proviſion but what is deviſed by the will of the ſaid D. K. and therefore the truſtees named in the will in Hill. Term 1729, exhibited their *bill in Chancery againſt* the ſaid J. K. the *lunatic, to prove the ſaid will per teſtes, and to have* the ſaid *truſts thereof performed* and executed, which cauſe being at iſſue, and ſeveral witneſſes examined, the ſame came on to be heard before the Ld. Chancellor, who declared that the will was well proved. MS. Rep. 9 Apr. 1730. Luther v. Kerby.

16. H. T. *mortgaged his lands for near the value, and owing other debts* he made his will, *and deviſed all his real eſtate to A. and B. in truſt to ſell and pay debts and legacies*, and the *reſidue to his heir at law, who was his next brother, and beyond ſea* in the ſervice of the Eaſt India Company. *B. covenanted with W. to ſell him part of the truſt eſtate, and W. covenanted, to pay intereſt for the purchaſe money from Lady Day next, and entered on part of the premiſes.* The *creditors brought a bill to compel W. to complete his purchaſe* that they might be paid their debts. *The will was proved in equity, and W. ſaid he believed that T. did duly execute the will, but that the heir at law, though made a party defendant, had not appeared to, or anſwered the bill* that he was willing to proceed in his purchaſe, all proper parties joining, whereof the heir at law was one. Ld. Chan. King ſaid, it is very proper that a will diſpoſing of lands ſhould be proved

proved in equity, eſpecially in the caſe of a modern will; but I cannot ſay this is abſolutely neceſſary to make out the title, any more than it would be to prove a deed in equity, by which an eſtate is ſettled from the heir at law after the anceſtor's death. The will prevents and breaks the deſcent to the heir as much as a deed, and the hands of the witneſſes to the will may be as well proved as thoſe to a deed, and it is the better if in the indorſement to the will it is mentioned that the will is atteſted by three witneſſes, who ſubſcribed their names in the preſence of the teſtator. Now, as it would be no objection to a title if a modern deed, on which the title depended, was not proved in equity, why ſhould it be ſo in the caſe of a will, where the ſame appears to be duly atteſted by three witneſſes, whoſe names are mentioned to have been ſubſcribed in the preſence of the teſtator? But in preſent caſe it appears the defendant, who articled for the purchaſe, knew at that time the heir was beyond ſea, and ſtill accepted the title, without inſiſting that the heir ſhould join, or that the will ſhould be proved againſt the heir. Alſo the defendant admits by his anſwer, that the will was duly executed, and by entering upon great part of the eſtate, has himſelf executed the purchaſe; for which reaſon let him pay the reſt of the purchaſe money with intereſt, according to the articles, and at the ſame time let the truſtees and mortgagees join in proper conveyances to the defendant the purchaſor. It ſeems in this caſe to have been a great help to the title, that the mortgage made by the teſtator, and prior to the will, was for the greateſt part of the purchaſe-money, which muſt be kept on foot for the protection of the title. 3 Wms.'s Rep. 192, 193. Trin. 1733. in caſe of Colt v. Wilſon & al.' [ 64 ]

## (B. 5) Probate of the Will ſtayed or compelled. In what Caſes.

1. THE ordinary may compel the executor to prove the teſtament *by excommunication, and* may *ſequeſter the goods* till they will prove the teſtament. Br. Executors, pl. 90. cites 9 E. 4. 33. 47. Br. Ordinary, pl. 13. cites 9 E. 4. 33. S. C.

2. Probate of a will is *ſuſpended by appeal.* Roll. Rep. 226. pl. 33. Trin. Jac. B. R. ſeems to be the caſe of Hornegold v. Bryan. 3 Bulſt. 72. S. C.

3. A *perpetual injunction* was awarded againſt the defendant not to prove a will, touching a perſonal eſtate only, in the prerogative court by the Maſter of Rolls. Chan. Caſes, 80. Hill. 18 & 19 Car. 2. Beverſham v. Springhold. But note, that in this caſe it was directed by the Court to be tried at law whether a will or no, and found againſt the will, and then this injunction was awarded. Ibid.

4. The ordinary cannot *ſtay* probate *at the ſuit of a creditor till a commiſſion of appraiſement* iſſued be *returned.* Gibb. 125. Hill. 3 Geo. 2. B. R. The King v. Dr. Bettiſworth.

## (B. 6) The Force of Probate of a Will.

1. A Teſtament proved is of ſo great force that a man ſhall not have a direct traverſe thereunto, nor unto the letters of adminiſtration; but the defendant may ſay againſt the teſtament, that the teſtator made not the plaintiff his executor, &c. and ſome have ſaid, that becauſe the writ ought to agree with the teſtament that the teſtament is traverſeable, but that it is falſe, for a ſcire facias to do execution ought to agree with the words of a fine in the manner, &c. yet the fine is not traverſeable directly, &c. and the reaſon why the teſtament is not traverſeable is, becauſe that then it ſhall be tried by the certificate of the ordinary, and he will not certify contrary to that which is ſhewed unto the Court under his ſeal, or under the ſeal of the officer deputed to the ſame. Perk. ſ. 493.

2. Probate of a will in the ſpiritual court does not bind in B. R. nor in the ſpiritual court itſelf any ſtranger, if it be *proved in communi forma.* Roll. Rep. 21. Paſch. 12 Jac. B. R. Egerton's caſe.

3. If the ſame *ordinary certify* to the Court under his hand and ſeal that there is no will in his court *againſt his probate*, this certificate ſhall not be given in *evidence*. So if ordinary in England againſt his probate makes ſuch certificate, the probate ſhall be preferred, becauſe it is a judicial act. Agreed by Doderidge and Chamberlain in evidence to a jury. Palm. 163. Paſch. 19 Jac. B. R. Lee v. Roblin.

4. An executor may be *admitted to prove the revocation of any legacy notwithſtanding he had proved the will*, which it was objected
[65] he could not do without taking an oath that it was the teſtator's laſt will; for he only ſwears that he believes it to be the teſtator's will, and at that time he might not know of the revocation. Vern. 20. pl. 12. Mich. 1681. Jervois v. Duke.

5. Whether the probate of a will be *concluſive* has been variouſly allowed, but of later-times it has been adjudged that *nothing can be given in evidence againſt it but forgery, or its being obtained by ſurprize.* Raym. 405. Mich. 32 Car. 2. B. R. Chicheſter v. Philips.

This caſe in Raym. 405, 407. is certainly good law that the ſeal of the ordinary cannot be contradicted, becauſe if there be no way in the temporal courts to prove the will relating to chattels it muſt go on in the ſpiritual court, and the determination there muſt be final; for the temporal courts cannot make a judgment concerning the will contrary to what was made in the eccleſiaſtical court, and therefore if they ſhew a probate under the hand of the ordinary they cannot prove in evidence that the will was forged, or that the teſtator was non compos, or that another perſon was executor. But they may give in evidence that the ſeal was forged, or the will repealed, or that there were bona notabilia; becauſe that is not in contradiction to the real ſeal of the Court, but admits the ſeal and avoids it. Per Gilbert Ch. B. Gilb. Equ. Rep. 207, 208. Hill. 12 Geo. in caſe of Marriot v. Marriot.

If a will be proved before a wrong ordinary it is cauſe of reverſal in ſome caſes; ſo if there be any falſehood in the proof were it communi forma that is without witneſſes, or by examination of witneſſes, yet it may be undone if either diſproof can be made, or proof of revocation of ſuch will, or of the making a later. Went. Off. Ex. 48.

Though the ſeal of the ordinary eſtops the defendant to ſay that the will is not proved in ſuch manner, yet he may deny the plaintiff to be executor; becauſe the ſeal of the ordinary is but matter of fact, and not matter of record. Went. Off. Ex. 48.

6. *Will under probate eccleſiaſtical* is not triable in Chancery, whether there be a *revocation* of it or not. But Ld. Chancellor bid them go to the eccleſiaſtical court, and prove it there. 2 Ch. Caſes, 178. Mich. 2 Jac. 2. Attorney General v. Ryder.

7. *Will of perſonal eſtate only*, and proved in the ſpiritual court, though *gained by fraud*, yet cannot be controverted in equity; but if a party claiming under ſuch will, comes for any aid in equity, he ſhall not have it. 2 Vern. Rep. 76. Trin. 1688. Nelſon v. Oldfield.

8. A *legacy* in a will *is forged*. The executor proves the will in the ſpiritual court, it relating only to perſonal eſtate, and after brought a bill to be relieved againſt this legacy in equity, but Cowper C. *diſmiſſed* the bill *with coſts*. For the *executor might have proved the will* in the ſpiritual court, *with a particular reſervation as to this legacy*, and ſaid that his remedy muſt be there. Wms.'s Rep. 388. Mich. 1717. Plume v. Beale.

9. *Perſon who proved a will in the ſpiritual court*, by which he *ſwears the teſtator was of ſound memory, after controverts the ſame will at law as to the real eſtate*, upon which an iſſue was directed, compos or non compos, and *found non compos*. MS. Tab. 1717. April 1. Montague v. Maxwell.

10. Executor may traverſe the executorſhip of another, for whether a will or no will is a queſtion triable by a jury, as is agreed 8 Rep. 134. Mer. Treſham's case. 9 Rep. Abbot de Strata Marcell's case, and the reaſon is, becauſe the ſpiritual court had not the original juriſdiction of the probate of wills, and becauſe as to trial the temporal courts have quaſi a concurrent juriſdiction; and this is not like the caſes, 1 Sid. 359. and 1 Lev. 235. that the probate of a will concludes a perſon from ſaying there was no ſuch will; but notwithſtanding this matter may be brought to trial; for the producing a will under probate is only evidence that there was ſuch a will; and though it is evidence of ſo ſtrong a nature that no evidence ſhall be admitted againſt it, yet to plead that ſuch a will was proved is no reaſon why this matter ſhould not be tried. Therefore judgment was given for the plaintiff. Comyns's Rep. 150. 152. pl. 102. Mich. 5 Ann. C. B. Anon.

11. Will *concerning perſonal eſtate proved in the ſpiritual court;* [66] reſpondent having a former will in his favour brings *his bill to diſcover by what means the latter will was obtained*, and to have an account of the perſonal eſtate, and whether the teſtator was not incapable and impoſed upon. Defendant demurred, becauſe it belonged to the ſpiritual court only to prove the validity of wills, and the former will was not proved in the ſpiritual court as the will in his favour was. The demurrer was over ruled. Note, It was mentioned in the reſpondent's caſe, that the appellant, who was the executor of the proved will, was only in the nature of a truſtee for the reſpondent. MS. Tab. Feb. 6th, 1723. Andrews v. Powis.

## (C) Adminiſtration.

### In what Caſes it ſhall be granted.

[1. IF *all the executors refuſe* to adminiſter, adminiſtration ſhall be granted. * 21 E. 4. 24. † 20 H. 6. 1. b. 38 H. 6. 8. for now the *teſtator dies inteſtate*. 19 E. 3. Covenant, 24. 50 E. 3. 9. But otherwiſe it is if *one refuſe and another proves* the teſtament. 9 Rep. 37. HENSLOE'S CASE.]

* Br. Executor, pl. 117. cites S. C. but not S. P. but ſays, that if a man makes 20 executors, and one proves the teſtament, it is ſufficient for all if the others will agree to it, and the refuſal before the ordinary is no eſtoppel to them to adminiſter after; per tot. Cur. And they had no regard to the ſpiritual law, which is contrary in this matter. ——— Br. Executor, pl. 117. cites 21 E. 4. 24. ——— But if there are two executors, and he that proves it dies, and he that refuſed before the ordinary will not adminiſter, the ordinary may ſequeſter. Ibid.

† Fitzh. Executors, pl. 15. cites S. C.

Mod. 213. pl. 47. Paſch. 28 Car. 2. C. B. Parten v. Baſeden, S. P. held contra, and that the committing of adminiſtration in ſuch caſe is a mere void act. ——— S. P. by Holt Ch. J. accordingly, and cites S. C. 1 Salk. 308.

[2. If an *executor adminiſters before probate* of the will, *and after refuſes* to prove the will, and to adminiſter when the ordinary makes proceſs againſt him, the ordinary may grant adminiſtration. 3 H. 7. 14.]

[3. If a man *makes an executor, but it is not known*, or concealed, the ordinary may grant adminiſtration, and this ſhall be good *till* the other prove the will. 7 E. 4. 12. b. 13.]

[4. But if a man *makes an executor*, the ordinary cannot grant adminiſtration *before refuſal* of the executor. 3 H. 4. Adminiſtrat. 22. adjudged.]

[5. If A. makes a *promiſe to B. and after B. dies inteſtate*, and *adminiſtration of his goods is granted to C. who dies inteſtate after*, and then adminiſtration is granted *to D. for the goods of C.*—D. cannot have action on the promiſe made to B. as adminiſtrator to C. for he is not adminiſtrator to B. inaſmuch as adminiſtration is not granted to him of the *goods of B. unadminiſtered by C.* Adjudged per Cur. upon demurrer, Mich. 15 Car. B. R. GOSLING AGAINST OSBOURN. Intratur Trin. 15 Car. Rot. 926.]

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‡ Br. Executor, pl. 117. cites S. C. but not S. P. though it ſeems admitted there. ——— Where executor adminiſters, and after refuſes, if adminiſtration be granted during his life it is void; per Holt Ch. J. 1 Salk. 308. Mich. 11 W. 3. C. B. in caſe of Wangford v. Wangford, cites Mod. 213. Parten's caſe.

[6. If *all the executors refuſe before the ordinary*, adminiſtration ſhall be granted. ‡ 21 E. 4. 24. 20 H. 6. 1. b. 36 H. 6. 8.]

‖ If A. makes B. his executor and dies, and B. proves the teſtament and dies, the ordinary may ſequeſter the goods of A. as well as of B. for it is the ſame thing now as if A. had died inteſtate at the firſt. Br. Executor, pl. 117. cites S. C.

[7. If an *executor dies inteſtate*, adminiſtration ought to be granted of the firſt teſtator, for now he dies inteſtate. ‖ 21 E. 4. 24. 26 H. 8. 7.]

[8. But

[8. But if an *executor after adminiſtration dies inteſtate*, and the ordinary grants adminiſtration of all the goods of the executor, he may adminiſter the goods of the firſt teſtator. 10 E. 4. 1. (Quære this.)]

## (C. 2) [What Power the Executor, or Adminiſtrator of an Executor has, as to the Goods of the firſt Teſtator.]

[9. If an *adminiſtrator makes his executor and dies*, his *executer* ſhall not have the adminiſtration of theſe goods, but a *new adminiſtration* ought to be granted of them. 34 H. 6. 14. D. 32 H. 8. 47. adjudged 11 Rep. 5. BRUDNELL'S CASE. 9. b.]

So where a man mkes two executors and dies, the one executor makes an executor and dies; the other ſurvives and dies inteſtate; the executor of the executor ſhall not meddle; for the power of his teſtator was determined by his death, and by the ſurvivor of the other; ſo that now the ordinary ſhall commit the adminiſtration of the goods to the executor who ſurvived, & de bonis non adminiſtratis of the firſt teſtator. Br. Executors, pl. 149. cites 32 H. 8.

[10. If an *executor before probate* of the will of his teſtator *makes an executor and dies*, the executor of the executor cannot take upon himſelf the execution of the firſt teſtament, but *adminiſtration of the goods of the firſt teſtator cum teſtamentō annexo ſhall be granted.* D. 22 & 23 El. 372. *b.* ſaid by the judges of the prerogative court to be the uſe and cuſtom of the ſaid court of prerogative, and agreeable to the law by the opinion of Dyer, to which the Court gave credit.]

Where the executor dies after adminiſtering and before probate, his executor cannot prove the will of the firſt teſtator, becauſe he is not named executor to him in the will, and no one can prove the will but who is named executor in the will. The executor's not proving the will does, upon his death, determine his executorſhip, but not avoid it; per Holt Ch. J. 1 Salk. 309. in the caſe of Wankford v. Wankford.

11. If the ordinary commits adminiſtration to J. S. he may *refuſe* the adminiſtration, and then the ordinary may commit it to another; for he cannot compel him to adminiſter. Br. Adminiſtrator, pl. 7. cites 34 H. 6. 14.

12. If a *man makes an executor who adminiſters*, and they *will not* come to *prove the teſtament when the ordinary makes proceſs* againſt them, then *he may lawfully commit the adminiſtration over*; per Townſend J. Br. Adminiſtrator, pl. 32. cites 4 H. 7. 13.

Br. Executor, pl. 102. cites S. C.

13. A. makes his will, and directs that *one year after his deceaſe B. ſhall be executor.* The ordinary may grant adminiſtration *in the mean time*, and the ſale or gift of the goods by him within the year ſhall never be avoided by the executor after the year. Pl. C. 279. b. Paſch. 7 Eliz. in caſe of Greyſbroke v. Fox.

Br. Debt 140. ——— Pl. C. 281. S. C. cited per Dyer Ch. J. Ibid.

14. Two executors being in ſuit which of them was the true executor, it ſeems that the ordinary cannot grant adminiſtration pendente lite. Mo. 636. pl. 874. Hill. 37 Eliz. C. B. Robin's caſe.

[68] There is a difference where there is a controverſy in the ſpiritual court concerning the right of adminiſtration, and where it is concerning a will; for in the firſt caſe an adminiſtration granted pendente lite is good, but otherwiſe where the controverſy is concerning a will; for he that comes in under a will ſhall avoid all that which an adminiſtrator can do. Carth.

Carth. 155. Trin. 2 W. & M. in B. R. Frederick v. Hook.——Per three juſtices againſt one contra, and ſaid that neither ROBIN'S CASE nor the caſe of FREDERICK v. HOOPE were adjudged caſes. Gibb. 260. Paſch. 4 Geo. 2. B. R. Wollaſton v. Walker.——S. P. per three juſtices, that neither of thoſe caſes were adjudged, and that the reaſon given in Carth. did not maintain the opinion. 2 Wms.'s Rep. 590. in caſe of Walker v. Woollaſton.——2 Barnard. Rep. 63. Lee J. ſaid he had ordered the roll of that caſe of Frederick v. Hooke, Carth. 153. to be ſearched, and accordingly it was found that that plea in abatement in relation to the validity of the adminiſtration was there waived, and judgment was actually entered for the plaintiff, ſo that he ſuppoſed there was only a rule to ſhew cauſe in that caſe.

15. If a man *enters into religion* and makes no executors, the ordinary ſhall grant adminiſtration. 9 Rep. 40. a. Trin. 42 Eliz. in Henſloe's caſe.

16. If *all the executors refuſe*, adminiſtration may be granted to another, and none of the executors can adminiſter, as where one of the executors proves the will. 9 Rep. 37. a. Trin. 42 Eliz. Henſloe's caſe.

17. If one makes *two executors*, *one* 17 *years old*, and *the other under*, adminiſtration during the minority is void, becauſe he of 17 may execute the will. Brownl. 46. Mich. 14 Jac. Anon.

18. If adminiſtration be granted *during minority of two* infants, and one dies, yet the adminiſtration continues. Brownl. 47. Mich. 14 Jac. Anon.

19. Ordinary may grant adminiſtration of the goods of an *alien*, if no will. Palm. 14. Arg. Trin. 17 Jac. B. R.

1 Salk. 309. S. P. per Holt Ch. J. in caſe of Wangford v. Wangford.

20. *Executor of executor* ſhall be allowed to be executor to the firſt teſtator; but per tot. Cur. this is to be underſtood when firſt *executor proves* the will. Palm. 156. Hill. 18 Jac. B. R.

S. C. cited by Holt Ch. J. 3 Salk. 307. Hill. 1 Ann.

21. Upon Engliſh bill the caſe was, that *ſeveral executors* were made, *and one proved the will*, and *the reſt refuſed*; and he *that had proved the will died*, and another perſon took out letters of adminiſtration and preferred his bill in this court. And the Court held clearly that by the proving of the will by one, they are all executors, and although he that proved the will die, yet *no other perſon can adminiſter during the lives of any of the reſt*. And it does not appear that they who refuſed are dead; whereupon the bill was diſmiſſed. Hard. 111. pl. 2. Paſch. 1658. Pawlet v. Freak.

22. *Defendant in execution was the next of kin to the plaintiff inteſtate*; and a motion was made for a habeas corpus to bring her from the counter in this court of B. R. that having adminiſtered to her creditor ſhe might be diſcharged; but it was denied, for ſhe could not be thus diſcharged, becauſe non conſtat de perſona; neither can ſhe give a warrant of attorney to acknowledge ſatisfaction; therefore let her *renounce the adminiſtration and get it granted to another*, and then ſhe may be *diſcharged by letter of attorney* from ſuch adminiſtrator. 2 Mod. 315. Trin. 30 Car. 2. B. R. Joan Bailie's caſe.

23. *Eccleſiaſtical judges* may provide for the diſpoſition of bona peritura in caſe of neceſſity pendente lite. Arg. Vent. 313. Trin. 29 Car. 2. in caſe of Baker v. Baker.

24. Ad-

24. Adminiſtration granted where there is *a will* and executors but *concealed*, the adminiſtration is void though executors renounce. 2 Lev. 182. Hill. 28 & 29 Car. 2. B. R. Abram v. Cunningham.

25. W. and R. were two brothers, a *legacy of* 100*l. was deviſed to R. who went beyond ſea*, and *after five years abſence, the other ſuggeſting he was dead, took out adminiſtration, and ſued for the legacy.* The Court decreed the 100l. and intereſt, to be paid to the plaintiff ever ſince R. went away, the plaintiff giving ſecurity that it ſhall be repaid to R. if ever he ſhould return; which ſecurity to ſtand for three years and no longer; but the plaintiff's own ſecurity to ſtand for ever. Fin. Chan. Rep. 419. Hill. 31 Car. 2. in caſe of Norris v. Norris. [ 69 ]

26. *The reſidue of my goods I give to my loving executor* (with a blank), adminiſtration muſt be granted. Paſch. 1681. Winn v. Littleton.

27. Where an executor dies before probate of the will, his executor cannot prove it, but *adminiſtration cum teſtamento annexo* muſt be granted to the reſiduary legatee, if any, or elſe to the next of kin. Vern. 200. pl. 196. Mich. 1683. Day v. Chapſield.

28. A. *died beyond ſea*, and made a *nuncupative will*, and thereby B. executor. C. took adminiſtration, and brought a bill for diſcovery of the ſuppoſed inteſtate's perſonal eſtate. B. pleaded the will, and that he was executor, and that A. left no eſtate in England. It was not neceſſary that the *will be proved here*, no more than if a man died and left an eſtate in Scotland. Vern. 397. Paſch. 1686. Jauncey v. Sealey.

29. It ſeemed to be agreed, that if executor becomes *non compos*, the ſpiritual court may commit adminiſtration, but not if he become *bankrupt*. 1 Salk. 36. pl. 1. Mich. 3 W. & M. in B. R. in caſe of Hills v. Mills.

30. If adminiſtration be granted, and the *letters of adminiſtration are loſt*, new letters of adminiſtration may well be granted after the action is commenced; but it is otherwiſe if they are then originally granted. Comyns's Rep. 18. in pl. 10. Mich. 8 W. 3. in B. R. Barton's caſe.

31. Two executors, *one renounces*, the other proves the will and dies; the executorſhip ſurvives to the other; but where there are two executors, and *one executor only acts and dies, and then the other renounces*, by this the teſtator is dead inteſtate, and the executors of the acting executor have nothing to do with the goods unadminiſtered, but adminiſtration ſhall be granted to the next of kin of the firſt teſtator. 1 Salk. 311. pl. 15. Houſe and Downes v. Lord Petre, December 19, 1700, coram delegatis.

32. Adminiſtration *granted to two; one dies;* it ſurvives to the other; for by Wright K. it is not a bare authority, but rather an office, and the office ſurvives. 2 Vern. 514. Mich. 1705. Adams v. Buckland.

S. C. cited by Ld. C. Talbot, and ſaid that the caſe of Bowden v. Bowden was determined contra in the eccleſiaſtical court. Caſes in Equity in Ld. Talbot's Time, 123. in caſe of Hudſon v. Hudſon, Trin. 1735. but upon the authority of Adams v. Buckland before the Ld. Cowper, he overruled the plea of adminiſtration having been granted to the plaintiff and another, which other died before the bill brought. Caſes in Equity in Ld. Talbot's Time, 127. Trin. 1735.

Fol. 908. (D.) Administration upon the Statute of 31 E. 3. Cap. 11.

## How it may be granted.

Hetl. 135. Hill. 4 Car. C. B. in Gray's case 12. b. 38 E. 3. 21. S. P. by Hutton, but by him and Harvey it is illegal. [1. THE ordinary may grant *several* administrations *of several parts* of the goods of the intestate. 10 E. 4. 1. b. 18 H. 6.]

Sid. 100. pl. 5. Hill. 14 & 15 Car. 2. B. R. Hammon v. Moor, S. P. held per Curiam clearly to be void. And though the goods are in several counties, yet it seems that the ordinary cannot commit administration of the goods in the one county to one, and in the other county to another. Sid. 101. pl. 5. Hill. 14 & 15 Car. 2. B. R. But there is added a quære bene. Adjudged 7 Mod. 148. Hill. 1 Ann. B. R. in case of Taylor v. Raines, that administration may be granted quoad, &c. as well as executor may be quoad. 1 Salk. 313. pl. 20. Shardelow v. Naylor, S. P. and seems to be S. C.

[2. The ordinary may grant administration *upon condition*, as where this was before granted to J. S. who is *outlawed* and *in prison beyond sea*, this may be granted to another, but so as if the said J. S. comes back into England, he shall administer when he comes back. 34 H. 6. 14.]

3. In debt, per Cur. administration *cannot* be committed *by parol*, but by writing; quod nota. Br. Administrators, pl. 27. cites 21 H. 6. 43.

4. *But* per Newton, it may be committed *by entry in the register, without committing it by letters sub sigillo*; quod quære inde; for to this it was not answered. Ibid.

5. Obligee of a *bond debt of* 500*l.* died intestate; the ordinary committed administration *of* 100*l. thereof to A.* and *of another to B.* &c. It was held clearly by the Court to be void, for several administrations cannot be committed of a *thing intire*. Sid. 100. pl. 5. Hill. 14 & 15 Car. 2. B. R. Hammon v. Moore.

6. Windham conceived that administration cannot be *committed of part of any debt*, but may be severally of the goods in several counties; sed Curia contra; they may commit administration to as many as they will, but not by several parcels, because given by statute. Keb. 434. pl. 17. Hill. 14 & 15 Car. 2 B. R. Taylor v. Gore.

7. As to the statute 31 Ed. 3. cap. 11. *the inconvenience before this statute was*, that albeit *the ordinary* might have seised the goods of the intestate in possession, yet he, *nor any under him, could sue for his debts in the king's courts, so the debtors would defraud the wife and children, and creditors lose their debts*. These administrators were but the ordinary's deputies, and by this statute they were accountable to the ordinary as well as before; it altered nothing in the substance of the thing, but did enlarge his authority to give him actions in the king's courts; so was the law taken, held, and practised. This appears by Linwood, 10 H. 6. in cap. de medietate ecclesiæ & ita quorundam testamentis; the gloss in verbo distributionis,

bufiohis, which gloſſes were made after 31 E. 3. cap. conſtitut' art' 14 H. 5. 470. ordained, the ordinary, in allowing the accounts, ſhould be abſque dolo. Per Dr. Walker. Cart. 132, 133. Trin. 18 Car. 2. C. B. in caſe of Hughes v. Hughes.

Adminiſtration pendente lite of a will is void, but not where the controverſy is about right of adminiſtration

* 8. Adminiſtration was granted *pendente lite about a will* whether will or no will, and if no will, then to whom adminiſtration belonged, and the adminiſtration was, *ad colligend'*, &c. and *ad ſolvend' æs alienum*, &c. and it was argued whether this was within any ſtatute ſo as the adminiſtrator was ſuable. The Court ſeemed pro quer' that the adminiſtrator was ſuable; ſed adviſare vult. 2 Jo. 134. Hill. 31 & 32 Car. 2. B. R. Impey v. Pit.

——— held per Cur. upon demurrer, Carth. 153. Frederick v. Hook. ——— S. C. cited per Lee J. but by the other three juſtices ſuch adminiſtration in caſe of a will was held good. Gibb. 260. Woollaſton v. Walker. —— And the three juſtices ſay, that the caſe of Mo. 636. Robins's caſe, and the caſe of Carth. 153. Frederick v. Hooke, are not adjudged caſes.

9. The bill was to have a *long leaſe* aſſigned, which *came to the plaintiff by virtue of an adminiſtration* of her former huſband, but *there were children of the inteſtate*; and it was referred to the civil law to determine the adminiſtration before a decree; for the ſtatute of H. 8. is, that adminiſtration be granted to the wife or child, and the wife having it, [the Court bid them] ſend back to ſee if the civil law doth not proportion the adminiſtration. 3 Chan. Rep. 61. Mich. 1670. Hunt v. Jones.

Show. 351. Fortre v. Fortre, S.C. but S. P. does not appear. ——— Adminiſtration may be granted quoad. Farr. 148. ——— Hetl. 135.

10. The Court held the ordinary may grant adminiſtration *to the brother quoad part, and to the wife for the reſt*; in which caſe neither can complain, ſince the ordinary need not have granted any part of the adminiſtration to the party complaining; but if the *inteſtate leave a bond of* 100 *l.* the *ordinary cannot grant adminiſtration for* 50 *l. to one* perſon, *and* 50 *l. to another*, becauſe this is an entire thing; annua nec debitum, judex non ſeparat ipſum. 1 Salk. 36. pl. 2. Mich. 3 W. & M. in B. R. Fawtry v. Fawtry.

——— 2 Ch. Caſes, 77. Taulurier v. Ward. ——— But it cannot be granted of goods in one county to A. and in another to B. quære. Sid. 101.

11. Since the ſtat. 22 & 23 Car. 2. it has been held, that the 31 *E.* 3. *cap.* 11. *is* thereby *repealed*; *the reaſon of diſtribution of the inteſtate's goods by the ordinary before the ſtatute* 22 & 23 *Car.* 2. *was*, becauſe there was no property of thoſe goods in any body, therefore the ordinary having the poſſeſſion he diſpoſed of them at his pleaſure, for there was no proprietor to controul him; per Holt Ch. J. Carth. 376. Paſch. 8 W. 3. B. R. Oldham v. Pickering.

3 Salk. 25. Slater v. May, S. C. per Curiam accordingly. —6 Mod. 304. S. C. the declaration was that admi-

12. An *adminiſtrator during* the *abſence* of J. S. (who is executor) *brought* an action of *debt on a bond, but did not aver* in his declaration, *where J. S. was abſent, or that he was abſent*; per Cur. it is but reaſonable that the ordinary may grant adminiſtration during abſence as well as during minority or pendente lite, and ſuch adminiſtrator is accountable to the executor. *We will intend it abſence beyond ſea*, but the plaintiff ought to aver that he was abſent,

niſtration was granted debita legis forma durante abſentia, and therefore the Court held it muſt be underſtood an abſence beyond the ſea. ——— 3 Salk. 23. S. C. ——— 2 Ld. Raym. Rep. 1071. Slater v. May. S. C. adjudged for the defendant.

ſent, and judgment for defendant. 1 Salk. 42. pl. 11. Mich. 3 Ann. B. R. Slaughter v. May.

11 Mod. 93. S. C. but S. P. does not appear. —— Holt's Rep. 204. S. C. but S. P. does not appear.

13. H. brought *debt* againſt T. *on a bond* of 2000 l. entered into by T. to F. deceaſed *as adminiſtrator to F. as to this bond only.* The defendant *pleaded in abatement that adminiſtration was before granted of this bond to C.* But per tot. Cur. this plea is only in bar, and cannot *be pleaded in abatement, and therefore a reſpondeas ouſter was awarded. 2 Ld. Raym. Rep. 1207. Mich. 4 Ann. Hacket v. Tilly.

*[ 72 ]

## (D. 2) Adminiſtration granted to ſeveral; their Power, and Pleadings.

1. DEBT againſt adminiſtrator, who *ſays that it was committed to him and another*, this is no plea *without ſaying that the other adminiſtered*, by which he ſaid ſo, and there the *adminiſtration by the other* is traverſable, and *not the committing* of the adminiſtration, and ſo ſee, that if the committee does not adminiſter he is not chargeable. Br. Traverſe per, &c. pl. 322. cites 8 H. 6. 2.

2. *A. and B. two bond-creditors taking joint letters of adminiſtration, A. gets* into his hands *beſt part of the aſſets*, and retains for his own debt againſt B. On a *bill for an account* queſtion was, whether A. by this had got ſuch a legal advantage as to be intitled to keep the aſſets, and ſo B. loſe his debt? Per Maſter of the Rolls, the rule of this Court in caſes of retainer is, unleſs the *party* can *ſhew a legal right to retain*, we never give it him; if he can ſhew a legal right, we never take it away from him. The queſtion then is, whether at law this be a good retainer? At law no doubt an executor or adminiſtrator has a right in caſe of debts in equal degree to prefer one to another, and to retain for his own in the firſt place againſt any other creditor. The *reaſon is* not (as ſome of the old books ſay) becauſe the law leaves it to the conſcience of the executor which debts to prefer, for that I take to be a fictitious reaſon, being contrary to the general principle of law, for a man thus to become judge in his own cauſe, and be left to determine which debt ought firſt to be paid, his own or another's. But the true reaſon is, becauſe if a retainer were not allowed, an executor in caſe of a deficiency of aſſets would have no poſſible way of obtaining ſatisfaction for his debt, for at law there is no ſuch thing as ſplitting of debt, or making a rateable proportion, and therefore he cannot come in upon an average with the reſt of the creditors, nor has the advantage of another creditor, who by bringing his action in due time may recover his debt, though there be not enough aſſets at laſt to anſwer all demands upon the teſtator; for he cannot ſue himſelf; ſo that this privilege of retainer

is

is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worſe condition than all mankind beſides; but this is not a caſe between an executor or adminiſtrator, and a creditor, but between two joint adminiſtrators who are both in the ſame condition in all reſpects. Now here has been no authority cited to ſupport a retainer by one adminiſtrator againſt the other, nor do I ſee how there ever could be one, becauſe an adminiſtrator can bring no ſort of action againſt his companion wherein this point might have been ſettled at law. Neither does the reaſon of the law juſtify ſuch a retainer, for adminiſtrators are conſidered but as one perſon in law, the poſſeſſion of the one is the poſſeſſion of the other, the receipt of one is the receipt of the other, and therefore the retainer of one muſt be conſidered as the retainer of the other, and muſt enure for their [ 73 ] mutual benefit in the diſcharge of the debts of both in proportion. Then the conſequence would be very bad were a retainer allowable in this caſe, for adminiſtrators muſt fight for the aſſets if getting the ſole poſſeſſion would entitle either to a ſeparate right in them, ſo that as no legal right of retainer has been ſhewn, the rule muſt take place, that he who cannot retain in law cannot in equity. The plaintiff is entitled to an equal diſtribution of the aſſets, being an equal creditor, according to conſcience and equity, and the defendant muſt be decreed to account. 26 Feb. 1738. in Canc. Chapman v. Turner.

2. *A recovery againſt one* joint-adminiſtrator ſhall bind him and all his companions, and therefore it is reaſon it ſhould bind all ſtrangers; per two juſtices, and the other two ſaid that they were of the ſame opinion; but they would be adviſed, &c. The principal caſe was debt againſt four adminiſtrators, who pleaded that one T. D. had brought debt in B. R. upon a bond for 100l. againſt one of the adminiſtrators, and recovered by a *nihil dicit*, and that they had riens enter maines to ſatisfy over and above the ſaid debt, and this was demurred to; and Anderſon and Beaumont held it a good plea; and if there be any covin in it, it is to be averred by the plaintiff; for prima facie it ſhall not be ſo intended, but that it is true. Cro. E. 471. pl. 23. Hill. 38 Eliz. B. R. Further v. Further.

3. A releaſe of one adminiſtrator not to prejudice the other. Toth. 264, 265. 6 Car. C. B. Horner v. Barrel. S.P. decreed accordingly by Ld. Ch. Hardwick, Mich. 11 Geo. 2. in Hudſon v. Hudſon.——One adminiſtrator cannot ſell goods or releaſe debts without the other, but they muſt all join. Wood's Inſt. 355. cites Bac. Uſe of the Law, Property, cap. 9.

## (E) Upon the Death of what Perſon Adminiſtration ſhall be granted.

The baron is the only true and lawful next of kin by the ſtatute of E. 1.

[1. IF a *feme covert* dies inteſtate, adminiſtration may be granted of her goods; for peradventure ſhe has *things in action*, the which are not given to the baron by the law. D. 8 Eliz. 251. 90. admitted.]

Show. 351. Hortree v. Hortree.

## (F.) Who ſhall grant it.

### Metropolitan.

* Br. Adminiſtrator, pl. 48. cites S. P. accordingly.

[1. IF he who dies inteſtate has *goods in divers counties*, the metropolitan ſhall grant the adminiſtration. 14 H. 6. 21. * 10 H. 7. 18. 35 H. 6. 43.]

And if the biſhop of another dioceſs than where the party dies commits the adminiſtration, this is void, though the metropolitan has not yet committed the adminiſtration; and this of goods moveable.

The adminiſtration belongs to the archbiſhop, though he has only the value of a penny in one county; per tot. Cur. Br. ſays quære if this word county ought to be dioceſs. Br. Adminiſtrator, pl. 31. cites 37 H. 6. 27, 28.

[74] [2. If he has *bona notabilia* to the value of 100*s.* *in divers dioceſſes*, the metropolitan ſhall grant adminiſtration. 10 H. 7. 16. b.]

[3. If a man *dies beyond ſea inteſtate*, the archbiſhop ſhall grant adminiſtration. P. 11 Jac. B. per Coke to be adjudged in 42 Eliz.]

4. If the *archbiſhoprick of York is void*, the archbiſhop of Canterbury ſhall have the ſpiritualities, and Brooke ſays, it ſeems that at that time he may commit adminiſtration. Br. Ordinary, pl. 22.

5. The granting of adminiſtration *of every biſhop's goods*, although he has not goods but within his own juriſdiction, does belong to the archbiſhop. 4 Inſt. 335.

S'd. 90. TULL v. OSBERSON, in C. B. ſeems to be S. C. in B. R. and held accordingly, becauſe ſeveral peculiars do not belong to the ordinary, but to the archbiſhop of the province: but true it is, that ſome belong to the ordinary, and becauſe it was ſo ſuggeſted for a prohibition where a cauſe was immediately transferred from the peculiar to the Arches, a prohibition was granted.

6. Where a man dies inteſtate, having goods in ſeveral peculiars, the granting adminiſtration does not belong to the ordinary of the dioceſs, but to the metropolitan of the province; for they are exempt from ordinary juriſdiction. Lev. 78. Mich. 14 Car. 2. C. B. Anon.

## Adminiſtration.

### (G.) By whom it ſhall be granted.

[1.] If a man has *bona notabilia in Ireland and in England*, and dies *inteſtate*, there ſhall be *ſeveral adminiſtrations* granted, viz. by the archbiſhop of Dublin for all within his province, and by the archbiſhop of Canterbury for all within his province. But it ſeems that it is intended that he has bona notabilia in divers dioceſſes within each province, or goods in his dioceſs; for otherwiſe it ſeems it ought to be granted by the ordinary where the goods are, and not by the metropolitan. D. 14 El. 305.]

The caſe was, that L. merchant of Ireland was obliged in eighty pounds to one D. of London; the obligation was made in Ireland, but always after remained in London. D. died inteſtate in the county of Bedford in England; the biſhop in Ireland committed the adminiſtration to the ſon of D. and he releaſed the ſaid debt to L. The archbiſhop of Canterbury committed the adminiſtration in England to the widow of D. who had gotten the obligation. It ſeems that notwithſtanding the ſaid adminiſtration and releaſe made in Ireland, the ſaid L. ought to anſwer to the ſaid action brought in London, and this by the opinion of the Court, but by reaſon of ill pleading the plaintiff had not judgment. D. 305. a. pl. 5. Mich. 13 & 14 Eliz. Daniel v. Lucre. ——— Dal. 76. pl. 5. S. C. and as to goods in Ireland the adminiſtrator there ſhall have them, and ſo the adminiſtrator in England ſhall have the goods here; but if a man has a leaſe for years of lands in England, and the deed of leaſe was at the time of his death in Ireland, the adminiſtrator in Ireland ſhall not meddle with this term; for ſuch chattels are local.

[2. In *time of vacation of the archbiſhop, or* of a biſhop, the *dean and chapter* ſhall grant adminiſtration. 36 H. 8. Brook Adminiſtrator, 276. per omnes legis peritos, and by thoſe of the Arches.]

Br. Adminiſtrators, pl. 46. cites S. C.

[3. It is ordained by a *canon* 1 *Ja. cap.* 92. *that if a man dies in a journey*, the goods which he has about him at the time ſhall not cauſe his teſtament or adminiſtrator to be liable to the prerogative court.]

Went. Off. Executor, 356. P. —Ibid. 282. S. P.

[4. If a man become *bound in an obligation in London, and dies inteſtate in Devon, and there had the obligation* at the time of his death, adminiſtration ought to be granted by the biſhop of * Exon, where the obligation was at his death, and not by the biſhop of London where the obligation was made; for the debt ſhall be accounted goods as to the granting adminiſtration where the deed was at his death, and not where it was made. Trin. 14 Car. B. R. adjudged per Cur. LUNN v. † DONSON in an action brought by the adminiſtrator in London, ſuppoſing the obligation to be made there, and ſhews the adminiſtration to be granted by the biſhop of Exon, and judgment that it lies upon demurrer to the declaration, and Mich. 15 Car. this was affirmed in a writ of error.]

So where a bond was made in Ireland but at the obligee's death was in London. D. 305. pl. 5.

† Fol. 309.

Daniel v. Lucre. ——— Dal. 77. pl. 5. S. C. & P. but ſays it is otherwiſe of a leaſe for years, for ſuch chattels are local; per Dyer Ch. J. quod Gawdy conceſſit.

* [ 75 ]

5. *Debt by adminiſtrator*, and *ſhewed letters of adminiſtration* as he ought, and were *committed by the biſhop's commiſſary*, and exception taken, becauſe it was not committed by the biſhop himſelf,

ſelf, who is immediate officer to the Court; & non allocatur; but by the commiſſary awarded good. Contra of certification of baſtardy, or of excommunication; for this ought to be by the biſhop himſelf. Note a diverſity. Br. Adminiſtrator, pl. 18. cites 1 H. 4. 64.

6. It was agreed that *letters of adminiſtration of the commiſſary ſuffices for the bringing of an action.* Br. Ordinary, pl. 6. cites 11 H. 4. 64.

7. If *one commits the adminiſtration as ordinary and is not* ordinary, there *in action brought*, the other may *ſay that J. N. is ordinary there, abſque hoc that he who granted the adminiſtration is ordinary there.* Br. Ordinary, pl. 2. cites 35 H. 6. 46.

8. *In vacancy of the archbiſhopric* of Canterbury or York, adminiſtration ſhall be granted by their reſpective deans and chapters; per omnes legis peritos, and thoſe of the Arches. Jenk. 202. pl. 23. cites 36 H. 8. Br. Caſes, 276.

9. Aſſumpſit by an adminiſtrator, and declared of an adminiſtration *granted* to him *by T. T. batchelor of law*, commiſſary of the biſhop of L. the defendant pleaded the ſtatute of 37 *H.* 8. *cap.* 17. that none by that ſtatute can be a commiſſary but a Dr. at law, and that ſince the darrain continuance the biſhop of L. granted to him letters of adminiſtration; the opinion of the juſtices was, that adminiſtrations were by the common law, and the *ſtatute* of 37 *H.* 8. *is not reſtrictive*, that no others may be commiſſaries than doctors, and if a batchelor of law cannot be a commiſſary, yet acts done by him are good till they be avoided by ſentence. Cro. E. 314. pl. 8. Hill. 36 Eliz. B. R. Pratt v. Stock.

*[ 76 ]

2 Le. 155. pl. 188. 19 Eliz. B. R. DUNNE's CASE, Wray and Southcote held adminiſtration granted by the biſhop in ſuch caſe to be void, but Gawdy and Jeffreys contra, for the granting letters of adminiſtration de mero jure doth belong to the ordinary, and it might be, that neither the ordinary nor the parties to whom he granted the letters of adminiſtration, had notice that the inteſtate had bona notabilia in another dioceſs. —— Mo. 145. in pl. 288. cites it as held clearly 19 Eliz. to be void. —— Noy, 96. cites it as ruled to be void. —— But if metropolitan grants adminiſtration where the inteſtate had not bona notabilia in divers dioceſſes, it is not void but voidable. Adjudged Hill. 22 Eliz. B. R. in caſe of Veere v. Jeofferies. —— * Mo. 693. pl. 959. in Cam. Scacc. Smithwick v. Bingham, adminiſtration granted by the archbiſhop was held good, without alleging that the inteſtate had goods in divers dioceſſes, becauſe it did not appear to the juſtices whether he had or not; but if it appeared to them, they took it clearly that the adminiſtration had been void if the inteſtate had not goods in divers dioceſſes. —— 3 Bulſt. 176. Paſch. 14 Jac. Coke Ch. J. cited the caſe of Vere v. Jefferies, and 5 Rep. 30. in Prince's caſe. —— Adminiſtration granted by the archbiſhop quatenus he is a metropolitan, though there be no bona notabilia, is good till repealed; per Holt Ch. J. and it was ſaid that if adminiſtration be committed in a dioceſs where there are bona notabilia, though ſuch grant be ipſo facto void, yet they do not grant a new adminiſtration in the Prerogative Court before they repeal that. 7 Mod. 146, 147. Hill. 1 Ann. B. R. Sir Richard Rains v. the Commiſſary of the dioceſs

10. Where *A. had goods only in one inferior dioceſs*, and *the metropolitan of the ſame province*, pretending that he had bona notabilia in ſeveral dioceſſes, *granted adminiſtration*; this adminiſtration is not void but *voidable by ſentence*; becauſe the metropolitan has juriſdiction over all the dioceſſes within his province, and conſequently cannot be void but voidable by ſentence. *But if an ordinary of a dioceſs commits adminiſtration of goods when the party has bona notabilia in divers dioceſſes*, ſuch adminiſtration is *merely void* as well as to the goods within his own dioceſs or elſewhere, becauſe he cannot by any means have juriſdiction of the cauſe. 5 Rep. 29. b. 30. a. cites it as adjudged Paſch. 22 Eliz. B. R. VERE v. JEFFRIES, and it is added, that true it is ſuch judgment was given.

dioceſe of Canterbury. ——— Wms.'s Rep. 43, 44. Paſch. 1701. in caſe of Blackborough v. Davis, Holt Ch. J. ſaid, that adminiſtration granted by an inferior ordinary where there are bona notabilia in divers dioceſes is abſolutely void.

Adminiſtration granted by a wrong ordinary is void; per Holt Ch. J. 1 Salk. 38. Paſch. 13 W. 3. B. R. obiter. ——— Cro. E. 457. Mich. 37 & 38 Eliz. in Cam. Scacc. the ſame diſtinction was moved by Coke attorney general, and ſaid that this difference had been taken and agreed in B. R. but the juſtices ſaid that it was all one, and that the adminiſtration is void in both caſes, and not avoidable only.

11. Leſſee for years died *poſſeſſed of ſeveral leaſes of ſeveral lands, ſome* of them *in the dioceſs of York*, and *ſome in a peculiar in the ſame dioceſs*, having *deviſed thoſe leaſes to his ſon, and made his daughter, an infant, executrix*; the *mother took out adminiſtration durante minore ætate of the daughter executrix in the peculiar where her huſband died*; reſolved that there ought to be *two adminiſtrations* granted; for the archbiſhop ſhall not have a prerogative here, becauſe this peculiar was firſt derived out of his juriſdiction. Cro. E. 718. pl. 46. Mich. 41 & 42 Eliz. C. B. Price v. Simpſon.

12. Where an *adminiſtration granted by the ſpiritual court* is *affirmed upon an appeal to the Arches*, the uſage is to ſend the cauſe back. But *when the firſt ſentence is reverſed, the firſt court ſhall be ouſted* of juriſdiction, *and the court which reverſes it ſhall grant adminiſtration de novo*; agreed. Lat. 85. Paſch. 1 Car. Reeve v. Denny.

13. In an action of debt brought by an adminiſtrator, the plaintiff declares of letters of adminiſtration granted to him *per Carolum regem*, &c. without ſaying *debito modo*, &c. and upon demurrer to the declaration it was adjudged good, becauſe the king hath univerſal juriſdiction here. Allen, 53. Paſch. 24 Car. B. R. Hobſon v. Wills.

14. If a man dies, leaving *bona notabilia in both provinces*, there *muſt be ſeveral adminiſtrations*, and ſo is 33 H. 6. and adminiſtration granted in one province is void as to goods in another; becauſe they are diſtinct ſupreme juriſdictions; per Cur. clearly. Hardr. 216. pl. 7. Mich. 13 Car. 2. in Scacc. Alliſon v. Dickenſon.

15. If the inteſtate leaves *goods in the ſeveral provinces* of York and Canterbury, ſeveral adminiſtrations ought to be granted; ſo if in England and Ireland. Per Hale. 2 Lev. 86. Paſch. 25 Car. 2. B. R. Shaw v. Stoughton.

Freem. Rep. 102. pl. 117. S. C. accordingly. But if a man hath goods in one of theſe provinces, and more goods in France or in the Eaſt Indies, one adminiſtration ſhall ſerve the turn, becauſe there is no juriſdiction that we take notice of. ——— Or ſeveral goods in England and Ireland there muſt be ſeveral adminiſtrations, and yet adminiſtration in the Arches extends all over the world but Ireland and York, who have particular archbiſhops. 3 Keb. 163. pl. 36. Paſch. 25 Car. 2. B. R. in caſe of Shaw v. Staughton.

16. A man *dies in France*, and *hath goods in the dioceſs of N.* and the queſtion was, whether the biſhop of Norwich ſhould grant adminiſtration, or the archbiſhop? Per North Ch. J. *the biſhop of Norwich ſhall grant adminiſtration, unleſs he hath bona notabilia*; and his dying in France is no more than if he died in Norwich. Freem. Rep. 256. pl. 273. Trin. 1678. Cecil v. Darkin.

17. If adminiſtration is granted *by a peculiar where there are bona notabilia*, it is not void, but *voidable*. Carth. 148. Trin. 2 W. 3. B. R. Gold & al' v. Strode. [ 77 ]

18. Upon *ſuſpenſion of archbiſhop Sancroft*, adminiſtration was granted by the dean and chapter, and good. Lutw. 30. Trin. 2 W. & M. in caſe of Young v. Caſe.

Where the debtor lives. Arg. Cumb. 392. Yeoman v. Bradſhaw.

19. *Simple contract debts* are perſonal, and adminiſtration muſt be committed of them where the party dies. 1 Salk. 37. pl. 4. Paſch. 12 W. 3. B. R. Hilliard v. Cox.

12 Mod. 385. Sillard v. Cox. S. C. & S. P. held accordingly. —— Ld. Raym. Rep. 562. S. C. & S. P. by Holt Ch. J.

20. A. has two *houſes in ſeveral dioceſſes*, and lives moſtly at one, but ſometimes at the other, and being there for a day or two, dies; adminiſtration of his perſonal eſtate ſhall be granted by the biſhop of the dioceſs, for he was *commorant* there, and not there as a traveller. 1 Salk. 37. pl. 4. Paſch. 12 W. 3. Hillier v. Cox.

11 Mod. 222. pl. 18. Paſch. 8 Ann. B. R. Burſton v. Ridley. S. C. & S. P. per Curiam.

21. Where there are *bona notabilia in ſeveral dioceſſes of the ſame province*, the Prerogative Court muſt grant adminiſtration; but where *in one dioceſs in one province*, and *in another dioceſs in another province*, each archbiſhop muſt grant adminiſtration. 1 Salk. 39. pl. 8. Mich. 1 Ann. B. R. Burſton v. Ridley.

23. Adminiſtration in the *province* of *York* does not extend to *judgment in the Queen's Bench*, Weſtminſter, becauſe it is aſſets at Weſtminſter in the province of Canterbury. 7 Mod. 15. Paſch. 1 Ann. B. R. Carliſle v. Greenwood.

S. P. by Holt Ch. J. that without doubt it is no good title becauſe it is local. 6 Mod. 136. in S. C.

24. So of adminiſtration granted by the archdeacon of Dorſet. 1 Salk. 40. Paſch. 3 Ann. B. R. Adams v. Savage (tertenants).

25. *Archdeacons*, as ſuch, have no power to grant adminiſtrations of goods, though moſt in England do it, but not quatenus archdeacons; but by a preſcriptive right, and ſometimes they do by peculiars, and ſometimes by themſelves. 6 Mod. 134. Paſch. 3 Ann. B. R.

26. 4 & 5 *Annæ, cap.* 16. *ſ.* 13. *Enacts, that the ordinary of the dioceſs, or ſuch other perſons to whom the ordinary power of the probate of wills, or granting adminiſtration, doth belong, do grant the ſame in relation to the goods and chattels of* perſons *dying inteſtate, to whom monies or wages are due, for work done in his majeſty's yards or docks, and that the ſalary, wages, or pay, due to any ſuch perſons, for work in the yards or docks as aforeſaid, ſhall not be deemed to be bona notabilia, whereby to found the juriſdiction of the Prerogative Court.*

27. B. executor of A. proved the will in the dioceſs of Li.—— B. brought action as executor of A. againſt C. and had judgment, C. was *taken in execution and eſcaped*; B. the *executor died inteſtate*. D. took adminiſtration cum teſtamento, &c. de bonis non of A. in the ſame dioceſs of Li. and brought debt againſt the ſheriff for the eſcape. Per three juſtices againſt one in this caſe, the judgment being entered in Middleſex, that ought to have been a *prerogative adminiſtration*. 8 Mod. 244. Paſch. 10 Geo. in the Exchequer Court. Anon.

## (G. 2) Adminiſtration.

### By whom granted. At what Place.

1. THE *biſhop of London* may commit adminiſtration, he *being at York;* but it ought always to be of things within his dioceſs; per Cur. clearly. Godb. 33. pl. 41. Paſch. 27 Eliz. C. B. in caſe of Carter v. Crofts.

In debt by an adminiſtrator he declares of the adminiſtration

committed to him at London by the biſhop of Exeter, and yet it is well, for the power of a biſhop is not ſo local as the authority of a juſtice of peace. Noy, 112. Barns v. Ld. Mordant.

The granting letters of adminiſtration is not a judicial, but only a miniſterial act, becauſe the ordinary is directed by the ſtatute to grant it, and therefore good though granted at York by the archbiſhop of Canterbury, and in debts brought by ſuch adminiſtrator it was adjudged for him. Lutw. 533. Trin. 5 W. & M. Boſwall v. Rawſtorne.

2. The *commiſſary of the biſhop of Norwich, being in London, granted adminiſtration there;* and it was held good, becauſe that power is not local, but follows his perſon. Godb. 342. pl. 436. Trin. 21 Jac. B. R. Knollis v. Dobbins.

3. A *biſhop of Ireland, being in England, committed adminiſtration of the goods of one who died inteſtate within his dioceſs in Ireland,* and adjudged good. Cro. C. 214. at the end of pl. 3. cites 27 Eliz. Chacren v. Barnes.

The granting adminiſtration is a perſon annexed to the perſon

of a biſhop; and is not local, for a biſhop of Ireland being in England may grant adminiſtration here of things within this dioceſs in Ireland; becauſe it is an authority, power, &c. which follows his perſon, but ſuch adminiſtrator cannot bring actions here by virtue thereof. Godb. 33. pl. 41. Paſch. 27 Eliz. Carter v. Crofts.——S. P. by Holt Ch. J. 6 Mod. 145. Paſch. 3 Ann. B. R.

4. Adminiſtration granted *in a foreign court (as at Paris)* is not taken notice of in our courts. 3 Wms.'s Rep. 371. Trin. 1735. Turton v. Flower & al'.

## (G. 3) Inteſtate.

### Who, though he left a Will.

1. IF A. by will *appoints that the executors of J. S. ſhall be his executors*, and he *dies living J. S.* there till the death of J. S. this is a dying inteſtate of A. for in the mean time A. has no executor. Pl. C. 281. b. by Dyer and Walſh. Paſch. 7 Eliz. in caſe of Greyſbrooke v. Fox.

So if A. makes J. S. [to be] his executor a year after his death; for within the year he

dies inteſtate, and therefore for this time the ordinary has power to commit adminiſtration, and it ſhall never be diſproved; per Dyer and Walſh. Pl. C. 281. b. in caſe of Greyſbrooke v. Fox.——And if executor proves the teſtament and dies inteſtate, there from the death of ſuch executor dying inteſtate, the firſt teſtator died inteſtate, and for that reaſon the ordinary may grant adminiſtration; per Dyer and Weſton. Ibid. 281. b. 182. a.

2. There are divers kinds of inteſtates, one that makes no will, another that makes a will and executors, and the *executors refuſe*,

in this case the *deceased dies quasi intestatus*; and this is within the statute of W. 2. cap. 19. 2 Inst. 397.

3. Where the strictness of the *civil law* is observed, there a man * cannot die *partly testate and partly intestate*; though here in England, where that ceremonial strictness is not observed, but all immunities enjoyed, being not obliged to any other observance in making testaments than what is jure gentium, a man may several ways die partly testate and partly intestate. 1 Godolp. Orp. Leg. cap. 19. s. 4.

* S.P. Ibid. 2d part, cap. 25. s. 8. near the end.

4. Error was assigned, that one pleaded *(cum testamento annexo qui obiit intestatus)*, which is absurd and repugnant; per Cur. it is well; for though one make a *will*, yet if he make no executor, he is intestate. Comb. 20. Pasch. 2 Jac. 2. B. R. Anon.

## (H) What Things shall be said Bona Notabilia. (And where.)

[1. IF a man has *goods of the value of 5l. in one diocess, and a lease for years of the same value in another diocess*, these are bona notabilia, by which the archbishop shall grant the administration, though the lease for years is not a thing moveable, nor properly bonum, but this is a chattel, as the pleading is.]

[2. But see the old Book of Entries, 324, where it is pleaded that the archbishop shall grant administration, because he had *bona notabilia* in divers dioceses.]

[3. If a man has *goods to the value of 5l. in one diocess, and an obligation of more value in another* diocess, the obligation *being made there also*, these are bona notabilia, for which the archbishop shall grant administration. D. 14 El. 305. 58. it seems it is so to be intended.]

Debt upon a bill of exchange is no more than a debt on simple contract, which follows the person of the debtor.

[4. To make bona notabilia *a debt without specialty* shall be accounted bona *where the debtor dwells*. H. 37 Eliz. B. and not *where the testator* dwelt. (It seems this is not law.)]

Carth. 373. Yeoman v. Bradshaw. —— Comb. 392. S. C. —— 12 Mod. 107. S. C. —— Debt upon a simple contract shall be said bona notabilia where the party himself dies; per Walmsley and Beamont. Noy, 54. in Byron's case. —— S. C. of Noy and of Roll, 909. cited Freem. Rep. 100. pl. 117. in case of Shaw v. Storton. Pasch. 1673. B. R. but in that case it was adjudged contrary according to the case of Cro. E. 472. Byron v. Byron, and Ld. Ch. J. cited one Needham's case 7 Jac. adjudged accordingly. —— 3 Salk. 70. pl. 1. and 164. pl. 10. S. C. & S. P.

[5. But a *debt upon specialty* shall be accounted bona where the deed was made. Hill. 37 Eliz. B. (It seems this is not law.)]

S. C. cited D. 305. pl. 58. Marg. —Noy, 54. Byron's case. —— Went Off. Executor, 46. cites Prettyman's case. —— But debt upon contract follows the person of the debtor. Cro. E. 472. Hill. 38 Eliz. B. R. Byron v. Byron. —— Noy, 54. S. C. & S. P.

[6. If a man dies intestate, having divers debts upon *obligations in several dioceses*, the debts shall be said to be bona notabilia where the obligations are, and not where the debtor or debtee are. Tr. 17 Ja. B. per Cur. TROWBRIDGE AGAINST TAYLOR.]

[7. If

[7. If a man *dies in a diocefs, not having any goods there, but has bona notabilia in another* diocefs, this will be fufficient bona notabilia for the archbifhop to grant adminiftration, &c. becaufe the ordinary, where he dies, by the law, is to take as great care of the teftator, and of his goods, as the other ordinary where his goods are. Mafter Selden faid to me, that he had been informed by thofe of the Court Chriftian, that this is the ufual courfe at this day.]

8. *Annuity for years out of a parfonage* fhall be bona notabilia where the parfonage is. D. 305. Marg. pl. 58. Mich. 13 & 14 Eliz. cites it as adjudged.

9. Debt upon an obligation the cafe was, the inteftate died in Lancafhire, the *obligation* upon which the action was brought *was in London at the time of his death.* The bifhop of Chefter, in whofe diocefs the inteftate died, granted adminiftration to J. S. who releafed to this defendant. The archbifhop of Canterbury granted adminiftration to the plaintiff, and in debt brought by him the releafe was pleaded in bar; it was holden by the juftices, that where one dies that hath goods in divers dioceffes, Canterbury fhall have the prerogative. And it was holden, that if Canterbury hath not prerogative in York, yet that this bond ought to be fued in, and adminiftration committed of it within the court of Canterbury. Cro. E. 472. pl. 25. Hill. 38 Eliz. B. R. Byron v. Byron.

Cro. E. 472. pl. 25. S. C. & S. P. by Anderfon. —Noy, 54. Byron's cafe. S. C. held accordingly. —S. C. cited per Curiam. 8 Mod. 244. Pafch. 10 Geo. in the Exchequer.

10. *Canon* 92, 93. made in time Car. 1. eftablifhes 5l. to be bona notabilia; yet therein is this *proviſo*, that where by *compofition or cuftom*, in any dioceffes, bona notabilia are rated at a *greater fum*, the fame fhall continue not altered. Went. Off. Ex. 45.

11. Went. Off. Ex. 45. fays, that a *defperate debt of* 5*l.* or more, or a *debt due from the king*, againft whom no fuit can be but only by petition, yet this will ftand for and as bona notabilia, as he takes it in the fpiritual court. But he fays, he only conjectures it, fince the rules of law do not determine it; and though it was debated in the time of Q. Elizabeth, yet it was not refolved.

12. If *land* is *given to executors for payment of debts and legacies*, this he thinks fhall not be bona notabilia, though it be aflets. Went. Off. Ex. 46.

13. Bona notabilia being *in fevera! peculiars in the fame diocefs*, the metropolitan is to grant *adminiftration*, and not the ordinary. Lev. 78. Mich. 14 Car. 2. C. B. Anon.

14. Executor or adminiftrator out of an inferior diocefs is plaintiff in equity, and defendant *pleads* bona notabilia, fo that plaintiff can give no difcharge, and the plea was allowed. 3 Chan. Rep. 71. 12 Oct. 1671. Knight v. Bee.

15. Exception was taken againft a prohibition, becaufe bona notabilia is of eccleſiaſtical juriſdiction; fed Curia contra; for *bona notabilia is where the obligation is.* 3 Keb. 438. pl. 50. Hill. 26 Car. 2. B. R. Loddington v. Draper.

16. *Adminiftration granted by a peculiar*, where there are bona notabilia, is not void but voidable. Carth. 148. Trin. 2 W. & M. in B. R. Gold & al' v. Strode.

17. So

17. So *administration granted by archbishop* of goods in another diocese, where there are not bona notabilia, is only voidable. 3 Lev. 212. Hill. 36 & 37 Car. 2. C. B. in case of Wrighton v. Brown.

18. *A. obtained a judgment against* J. S. *in B. R. and died.* B. as administrator to A. brought a scire facias on the judgment, and alleged *administration granted* to him *by the archbishop of York.* It was argued that this administration was void, by reason of the judgment in Middlesex, which is bona notabilia in another diocese, [ 81 ] and though it was after a verdict, yet here it appears on record that he had bona notabilia in Middlesex, & non constat that he had any at all in York. But upon another motion the Court thought it well enough, and gave judgment for the plaintiff. But the reporter says, quære tamen. 2 Show. 437. Mich. 1 Jac. 2. B. R. Atkinson v. Newton.

3 Mod. 324. S. C.

18. *Judgment* obtained in the court *at Westminster* makes bona notabilia, though the action on which it was obtained was laid in *Dorsetshire*, because the record was at Westminster; agreed. Carth. 149. Trin. 2 W. & M. in B. R. in case of Gold & al' v. Strode.

19. A *bill of exchange* shall be said to be bona notabilia where the debtor is, and not where the bill is; for it is *no specialty* in law. 3 Salk. 164. pl. 10. Yeoman v. Bradshaw.

1 Salk. 40. pl. 9. Pasch. 3 Ann. S. C. accordingly. —6 Mod. 174. S. C. & S. P accordingly. —— S. C. cited per Cur. 8 Mod. 245.

20. Grant of administration *by the archdeacon of Dorset* is void *quoad a judgment of B. R.* For the judgment of this court upon which the scire facias is founded is bona notabilia. And if it will not make bona notabilia, yet such grant of administration will be void quoad this judgment, because it lies out of the jurisdiction of the archdeacon of Dorset. And per Holt Ch. J. this court will take notice of the limits of ecclesiastical jurisdiction, which is part of the law of the realm under which we live, and consequently it will take notice, that a judgment of the king's bench is not within the jurisdiction of the archdeacon of Dorset. And for this reason the whole Court held, that judgment ought to be given for the defendant. 2 Ld. Raym. Rep. 856. Mich. 13 W. 3. B. R. Adams v. Savage.

2 Mod. 211. Anon. was cited in favour of a prohibition, but not much regarded. Ibid.

22. As to bona notabilia the *spiritual and common law are the same.* 10 Mod. 272. Mich. 1 Geo. B. R. Cottingham and Lofts.

23. In an action of debt against the sheriff, the case was thus: A. by his last will and testament made B. his executor and died; the executor proved the will before the commissary of the bishop of Litchfield, and as *executor of A. brought an action against C. and obtained a verdict and judgment*, and thereupon *C. was taken in execution* upon a ca. sa. and committed, *and afterwards escaped.* Then B. the *executor died intestate*, and *D. took out administration cum testamento annexo de bonis non of A.* in the diocese of Litchfield, and brought this action of debt against the sheriff for this escape, who demurred for that the judgment being without foundation of this action, and that being entered in Middlesex the plaintiff could have

no

no right to it by virtue of adminiſtration taken in the dioceſs of Litchfield, which as to this demand was void, for he ought to have a prerogative adminiſtration. Three of the barons, of which the chief baron was one, were of opinion that the plaintiff could not maintain this action without taking out a *prerogative adminiſtration; or an adminiſtration where the judgment was entered, and that was in the dioceſs of London;* that it was abſolutely neceſſary that he ſhould take out adminiſtration ſomewhere, and that there could be no inconveniency in taking out adminiſtration above. 8 Mod. 244. Paſch. 10 Geo. in the Exchequer. Anon.

## (I) Of what Value (Bona Notabilia) ought to be. [82]

[1. *ANciently* if a man died inteſtate having goods to the value of 40*s. in two dioceſſes*, this would make the goods to be bona notabilia, for which the adminiſtration ſhould be granted by the archbiſhop. Perkins, ſ. 489.]

[2. But in 37 H. 6. 28. it is held per Cur. that if a man has *goods in divers dioceſſes*, though the goods which he has *in one* county be but *of the value of* 1*d.* yet theſe are bona notabilia, for which the archbiſhop ſhall grant adminiſtration.]

[3. And in 10 H. 7. 16. b. it is pleaded that he had bona notabilia, ſcilicet, goods to the value of 5*l. in divers dioceſſes.*]

[4. If there are goods of the value of 8*l. in each dioceſs*, this ſhall make bona notabilia. H. 7 Ja. B. cited per Foſter to be adjudged in NEEDHAM'S CASE.]

[5. It is ordained by a *canon in* 1 *Jac. cap.* 93. *that bona notabilia ſhall be accounted to be* 5*l. at leaſt*, and that none ſhall be ſaid to have bona notabilia, unleſs he has goods in divers dioceſſes to the value of 5 l. and it ſeems that this canon hath changed the law if it was otherwiſe before; inaſmuch * as the grant of adminiſtration belongs to the eccleſiaſtical law, and our law only takes notice of their law in this, and therefore they may alter it at their pleaſure. H. 7 Ja. B. NEEDHAM'S CASE, per the Doctors and the Court, that 5 l. in each dioceſs ſhall be bona notabilia.]

Went. Off. Ex. 45. mentions it to be by a * Fol. 910. canon made in the firſt year of king Charles the firſt, at a convocation then held.

[6. Alſo *in the ſaid canon is an exception of ſuch dioceſs where, by the cuſtom or compoſition*, bona notabilia *are rated to a greater ſum than* 5*l.*]

It is regularly to be of the value of 5 l. but in the dioceſs of London it is 10 l. by compoſition. 4 Inſt. 335. cap. 74.

7. A bond *of* 5*l. penalty* conditioned for payment of a leſs ſum is not bona notabilia, though the bond be *forfeited*, and ſo the whole penal ſum be a duty. Went. Off. Ex. 45.

## (I. 2) Bona Notabilia. Pleadings.

2 Lutw. 1266. Pasch. 2 Jac. 2. in case of Sudal v. Wytham, S.P. insisted upon, sed non allocatur; for if it was so that he had not bona notabilia, yet the letters of administration granted by the archbishop were not void, but voidable only.

1. IN action by administrator to whom the archbishop of Canterbury had granted letters of administration, exception was taken to the declaration because it was *shewn that the archbishop by reason of his prerogative granted administration*, &c. *without shewing that the intestate had bona notabilia*, &c. but the exception was not allowed by reason all the precedents are so, which all the clerks in court did affirm. 2 Le. 155. pl. 188. 19 Eliz. B. R. Dunne's case.

[83] 2. In debt by executor he shewed the probate before the rural dean of Warrington; the defendant prayed oyer, the bishop not being mentioned in the declaration, and after oyer pleaded *that the testator had goods at Liverpool to the value of* 100 *l. and that he died there, and that the will then and before was in the diocess of the bishop of Chester, and that the bishop of Chester* for the time *had all jurisdictions spiritual of proving, &c. all testaments* of every person dying within the said diocess possessed of goods and chattels within the said diocess, *above the value of* 40 *l.* and no other person; whereupon there was a demurrer; and adjudged against the plaintiff. 2 And. 132. pl. 77. Mich. 41 & 42 Eliz. Cross v. Corbock.

3. An administrator pleaded *plene administravit*, and upon issue found for the plaintiff, and moved in arrest of judgment that administration was committed by the *archbishop of York*, where the intestate had *bona notabilia in London*, and this appeared within the record; Curia, if this was upon a demurrer they would have taken notice of it, but now the case being tried, and the honesty of it against the defendant, they would not; ideo judgment nisi. Skin. 237. Mich. 1 Jac. 2. B. R. Anon.

4. Debt as administratrix upon an administration granted to her by the bishop of R. the defendant pleaded, that administration was granted to him by the dean and chapter of Canterbury, sede vacante, for that the intestate had bona notabilia in divers dioceses in the province of Cantuar'. It was held, that because the *defendant did not shew in what places certainly the intestate had bona notabilia*, it shall be intended that administration was granted where he had not bona notabilia, in divers dioceses. 8 Rep. 135. Pasch. 8 Jac. C. B. Sir John Needham's case.

5. H. the administrator of E. F. brought an action of debt upon an obligation of 200 l. against E. F. and declares of letters of administration committed to him by the archbishop of Canterbury, &c. The *defendant says, that the intestate became possessed of goods in Chester within the county of York; and before the purchase of the writ*, and after the death of the intestate, *J. S. chancellor of Chester committed administration to R. F. of all the goods*, &c. *and that he released*

*to*

*to him*, and upon that demurs. Bramſton ſaid, he doth *not ſhew* what perſon that chancellor was, or *how he had that authority to grant adminiſtration*, quod fuit conceſſum per Cur. that for that it was naught. And it was agreed, that the prerogative of Canterbury does not extend to York. Het. 68. Hill. 3 Car. C. B. Harvey v. Fitton.

6. *Debt againſt the defendant as executor to John White*, who *pleaded, that John White did make a will, but did not make him* (the defendant) *executor*, but that he had bona notabilia in ſeveral dioceſſes, and that the archbiſhop of Canterbury granted adminiſtration to him, and concluded in bar, to which there was a demurrer, and the plea was adjudged ill, becauſe this was a plea only in abatement, whereas the defendant had concluded in bar; beſides, he did *not expreſsly allege, that John White died inteſtate, but only ſays, that he made a will, but did not make him (the defendant) executor by the will, which may be true, and yet he might be made executor by a codicil annexed* to the will, and ſo the plaintiff had judgment. 1 Mod. 239. Paſch. 29 Car. 2. C. B. Juſtice v. White.

7. Debt upon a bail bond, &c. The defendant pleads non damnificatus; the plaintiff replied, that R. W. had obtained a judgment againſt him in the Exchequer and died inteſtate, and that adminiſtration of his goods was granted by the biſhop of Lincoln to one W. G. and that he paid the money to the adminiſtrator. Upon a demurrer the defendant had judgment, becauſe the plaintiff alleged he paid the money to the adminiſtrator, when in truth he had no authority to receive it, for the *adminiſtration granted by the biſhop of Lincoln was void, becauſe the inteſtate obtained the judgment in Weſtminſter*. 1 Lutw. 399. Mich. 3 Jac. 2. Kegg v. Horton. [84]

8. The moſt certain way of pleading bona notabilia is, *that at the time of inteſtate's death he had bona notabilia in divers dioceſſes within the province of Canterbury, (viz.) at W. in the county of Middleſex and dioceſs of London, and at St. Edmund's-bury within the dioceſs of Norwich*, and that the adminiſtration was granted by the archdeacon of Sudbury. 2 Lutw. 985. 993, 994. Paſch. 4 W. & M. Scarpe v. Young.

## (K) To whom it ought to be granted.

[1. IF *feme covert* dies *inteſtate*, adminiſtration of her goods *of right belongs to her baron*. 4 Rep. 51. OGNELL's CASE.] S. P. held by three juſtices, contra Crook J. and S. C. cited Cro. C. 106. pl. 7. Johns v. Roe. ——— Jo. 176. Hill. 3 Car. Jones v. Roe. S. P. held accordingly. ——— Mo. 871. in pl. 1210. is a nota that Nichols and Warburton held, that the baron by equity of the ſtatute 21 H. 8. ſhall have the adminiſtration of the goods of the feme. ——— A prohibition was moved for, becauſe the ſpiritual court would have granted adminiſtration of the goods of the wife to his brother when her huſband was living, to whom of right it doth belong; day was given to ſhew cauſe why it ſhould not be granted. Palm. 521. Paſch. 4 Car. B. R. Dixe's caſe.

Where the wife dies the huſband is to have the adminiſtration, being the only true and lawful next of kin by the ſtatute of E. 3. Show. 351. Paſch. 3 W. & M. per Cur. in caſe of Fortre v. Fortre.

[2. If *feme covert dies inteſtate*, adminiſtration may be granted to a ſtranger, though her huſband be alive. D. 8 El. 251. 90.]

3. The biſhop may grant letters of adminiſtration *to whom he pleaſes*, if he forfeits the penalty limited by the ſtatute. Per Manhood and Periam J. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in Scacc. in caſe of Filcock v. Holt.

4. Perſons to whom adminiſtration ſhall be granted *muſt be legales*, and therefore if it be granted to perſons *outlawed or attainted*, a prohibition lies, or otherwiſe no remedy can be had for the lawful next of kin. 9 Rep. 39. b. Trin. 42 Eliz. in Henſloe's caſe.

Palm. 416. Mayo v. Strumpling. S. C. no prohibition granted, and Noy ſaid that the ordinary ought to judge who is the next of kin.

5. Prohibition was moved for to the *ſpiritual court* upon a ſuggeſtion, that they *refuſed to grant the adminiſtration to the next of kin* to the inteſtate, *but to another*, but the *prohibition was denied*. Lat. 67. Paſch. 1 Car. Mayow's caſe.

Cro. C. 106. pl. 7. Johns v. Rowe. S. C. & S. P. held by the three juſtices accordingly, and relied upon 4 Rep. 51. b. Ognel's caſe; but Crooke J. doubted thereof, and was of a contrary opinion; for that the ſaid book does not give any reaſon, nor ſhew any authority to maintain it, and in reaſon the huſband is not to have it de jure, but it is in the power of the ordinary to commit the adminiſtration unto him or to the wife's kindred; for if he ought to have it de jure, he would never ſuffer the wife to make any will for the advancement of the * children by another huſband, or for her kindred, and the wife without the huſband's aſſent cannot make a teſtament, but by his aſſent ſhe may make him executor for things in action, as debts, or des biens aſport before the coverture, ſo it is his default if ſhe dies inteſtate; alſo the wife is to be intended to be advanced by her huſband, and to have by the cuſtom rationabilem partem bonorum; therefore he is not in ſuch degree as his wife, and he is not de jure to have the adminiſtration; but the ordinary may commit it unto him if he pleaſe, or he may refuſe; and no appeal lies if the adminiſtration be not committed unto him; for it is merely at the ordinary's diſcretion; and of this opinion were the civilians; but afterwards the ſaid three juſtices in Crooke's abſence reſolved for the plaintiff.

6. In an appeal upon a commiſſion of delegates, Jones, Whitlock, and Yelverton, juſtices, were of opinion that *adminiſtration of the goods of the feme ought to be granted to the baron de mero jure*; but Dr. Steward and Dr. Pope e contra. Jo. 175. Hill. 3 Car. Jones v. Roe.

The baron by the equity of the ſtatute of 21 H. 8. ſhall have the adminiſtration of the goods of the feme; per Nichols and Warburton. Mo. 871. pl. 12 o. Trin. 12 Jac. in a nota in the caſe of Stoner v. Gibbons. The adminiſtration ought to be granted to the baron, and not to the mother of the wife. Sid. 409. pl. 3. Paſch. 21 Car. 2. B. R. Anon. —— S. P. admitted. Mod. 231. pl. 20. Hill. 28 & 29 Car. 2. C. B. in caſe of Daves v. Cutt. —— The baron is the only true and lawful next of kin by the ſtatute of E. 1. Show. 351. Paſch. 2 W. & M. Fortree v Fortree. —— 1 Salk. 36. pl. 2. Mich. 3 W. & M. in B. R. Fawtry v. Fawtry. S. C. and per Cur. adminiſtration muſt be granted to the huſband by 31 E. 3.

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S. P. and ſeems to be S. C. But where the wife is intitled, and ſhe refuſes to take the adminiſtration in her own name, the conſtant practice is to admit the huſband; and decreed accordingly. Gibb. 203. Vanthienen v. Vanthienen.

7. Where the *wife is next of kin* to an inteſtate, the *huſband* ſhall not be *joined* in the adminiſtration with her. Sty. 75. Mich. 23 Car. B. R. Anon.

8. If adminiſtration be granted to the huſband and wife *only during coverture*, perhaps it might be good. Allen, 36. Mich. 23 Car. B. R. Brown v. Wood.

See 2 Ch. Rep. 300. Pullen v. Serjeant cum teſtamento annexo.

9. *Executor dies, living teſtator*, adminiſtration ſhall be granted to the next of kin. Sti. 147. Mich. 24 Car. Brown v. Point.

10. Adminiſtration muſt be granted *to the brother of the half blood and not to the uncle;* for he has the immediate blood of the father, which the uncle has not; per Hale Ch. J. Vent. 425. in caſe of Collingwood v. Pace.

And Ibid. Hale ſaid that ſo it had been reſolved in Brown's caſe in 5 E. 6. and though that caſe cited in Br. Adminiſtration, pl. 47. miſtakes the law in preferring the half blood before the mother, yet it had been right in the caſe of a competition between the half blood and the uncle as to adminiſtration, though otherwiſe as to deſcent of land.

11. Adminiſtration granted *to the mother* of the goods of the daughter, where the *daughter has baron*, ſhall be repealed and granted to the baron. Sid. 409. Paſch. 21 Car. 2. B. R. Anon.

12. A *feme ſole had* divers *debts* owing to her *by ſpecialty, ſhe marries, and the bonds not being put in ſuit during the coverture ſhe died*, and her *huſband adminiſtered*, and *her brother ſues to have a diſtribution* by virtue of the ſtatute 22 Car. 2. cap. 10. and the queſtion was, Whether a feme covert was intended by that act, which provides only where the huſband dies inteſtate? And it was inſiſted that a married woman can never die inteſtate within the meaning of this ſtatute, becauſe it provides, that the ordinary ſhall take a bond of the adminiſtrator, if it appear that the deceaſed made any will, which a feme covert cannot do without the conſent of her huſband, therefore ſhe is not a perſon dying inteſtate within the intent of this law. Curia adviſare vult. 2 Mod. 20. Hill. 26 & 27 Car. 2. C. B. Wilſon v. Drake.

13. If adminiſtration of *the goods of a feme covert* be granted to the next of kin, though de jure, it ought to be to the huſband, yet till a repeal, the next of kin is rightful adminiſtrator, and may bring action. Mod. 231. pl. 20. Hill. 28 & 29 Car. 2. C. B. Davis v. Cutt.

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14. 29 *Car.* 2. 3. *ſ.* 25. Enacts, that the act of 22 & 23 *Car.* 2. 10. *ſhall not extend to the eſtates of feme coverts dying inteſtate, but that their huſbands may have adminiſtration of their perſonal eſtates, as before the making the ſaid act.*

A. had four daughters B. C. D. & E. and deviſed his perſonal eſtate among his ſaid four daughters equally. E. married J. S. and afterwards B. died inteſtate. J. S. the huſband of E. aſſigned over all his wife's ſhare of B.'s eſtate (conſiſting of choſes en action) to W. R. and then E. died. J. S. married again and died inteſtate. The ſecond wife took adminiſtration to J. S. and alſo to E. de bonis non adminiſtred by J. S. The queſtion was, Who was intitled to E.'s ſhare of B.'s eſtate, the aſſignment being without a valuable conſideration, and only in truſt, and the huſband not having taken out adminiſtration? Ld. C. Cowper thought the property bound by the aſſignment though voluntary, becauſe of the delays that might be uſed before he could recover in equity, which ought not to prejudice him; and that the exception in this ſtatute does not confine it to the life of the huſband, or to the circumſtance of his having reduced any part of the wife's perſonal eſtate into poſſeſſion, but provides that no part of her eſtate ſhall be diſtributable among her relations after her death, and decreed E.'s ſhare of B.'s perſonal eſtate to the adminiſtrator of J. S. Wms.'s Rep. 378. Mich. 1717. Squib v. Wyn.

15. *J. B. being in execution, the plaintiff died inteſtate, and the right of adminiſtration came to her*, and a motion was made for a habeas corpus to bring her from the counter in this court; for that having adminiſtered to her creditor, ſhe might be diſcharged; but it was denied, for ſhe could not be thus diſcharged, becauſe non conſtat de perſona; neither can ſhe give a warrant of attorney to acknowledge ſatisfaction, therefore *let her renounce the adminiſtration*,

*miniſtration, and get it granted to another, and then ſhe may be diſcharged by a letter of attorney from ſuch adminiſtrator.* 2 Mod. 315. Trin. 30 Car. 2. B. R. Joan Bailie's caſe.

16. *H. died inteſtate, without child or kindred.* The *king appointed the plaintiff to take out adminiſtration.* The defendant, though he knew that there was no kindred, entered caveats, and put the plaintiff to great charges, for which he brought an action. Upon demurrer the Court doubted if an action would lie; for it was damnum abſque injuria. For till adminiſtration the property of the goods was in the ordinary, and the plaintiff had neither jus in re, nec ad rem, otherwiſe if the plaintiff had been next of kin, for then he had a right by the ſtatute; and *the appointment by letters patents was but a kind of recommendation*, and that in caſe of an inteſtate without kindred, *the ordinary may diſpoſe in pios uſus*, and though the uſual courſe is for the ordinary to admit ſuch patentee, yet this was rather of reſpect to the king, than of right; and they denied the opinion in 9 Rep. HENSLOW'S CASE, and held that adminiſtrations originally belonged to the biſhop, and the inſtances of ſome lords of manors is not a proof to the contrary. 1 Salk. 37. pl. 3. Trin. 4 W. & M. in B. R. Manning v. Napp.

17. If a man die inteſtate, having a wife, the ordinary may grant adminiſtration *either to his wife or next of kin at his election*; but if the wife die inteſtate, the huſband may have the adminiſtration, and none elſe; per Holt Ch. J. Comb. 289. Trin. 6 W. & M. in B. R. Cox v. Webb.

18. By the ſtatute of 31 *Ed.* 3. the ordinary is to grant the adminiſtration to the moſt lawful *friends* of the inteſtate, and nothing is ſaid *of the next of kin till the ſtatute of H.* 8. and that commands him to grant it *to the next of kin requiring the ſame*; but neither ſtatute does incapacitate him to grant it to any other, only commands him to grant it to the next of kin, &c. Per Holt Ch. J. 12 Mod. 617. Hill. 13 W. 3. in caſe of Blackborough v. Davis.

Wood's Inſt. 574. in totidem verbis.— R. S. L. tit. Adminiſtrators, 22. cites Wood, 574. in totidem verbis.

19. Adminiſtration muſt be granted firſt to the *huſband of the wife's goods and* chattels; 2dly, to the wife of the huſband's goods and chattels, but an adminiſtration may be granted to the * *father before the widow*, and a *reſiduary legatee* ought to be preferred *before the widow* in an adminiſtration cum teſtamento annexo; if there is no huſband or wife living, then, 3dly, to the children, ſons or daughters; 4thly, if children die firſt, to the father or mother; then, 5thly, to a *brother or ſiſter of the whole blood;* 6thly, to a brother or ſiſter *of the half blood*, for they are all next of kin in equal degree; and if none of the half blood, then, 7thly, to the next of kin, *uncle, aunt, or couſin;* and if none of theſe deſire the adminiſtration, then, 8thly, to a *creditor;* for want of all theſe, 9thly, to any other perſon or perſons at the diſcretion of the ordinary; or the ordinary may ex officio grant to a ſtranger *letters ad colligendum bona defuncti*, to gather up the goods of the deceaſed, or the ordinary may take them into his own hands to pay the debts of the deceaſed in ſuch order as an executor or adminiſtrator ought to pay them; but he or the ſtranger who has letters

* [ 87 ]

ad

ad colligendum, cannot ſell them without making themſelves executors of their own wrong. The ordinary has only an authority, and no ſuch power himſelf, and therefore he cannot give that power to any other. R. S. L. 22.

20. If one has the *truſt of a term for years* and dies inteſtate, his next of kin ſhall have adminiſtration of it. 7 Mod. 148. Hill. 1 Ann. B. R. Taylor v. Raines.

21. *Feme covert* by virtue of a *power to diſpoſe of her eſtate* deviſes it to J. S. Adminiſtration was granted *to deviſee*, it being of a term for years; though the grant was by her huſband to truſtees for her as a fee-ſimple, and the heir at law of the wife releaſing to J. S. the term was decreed to J. S. againſt the huſband. Ch. Prec. 480. pl. 301. Hill. 1717. Marſhall v. Frank. Gilb. Equ. Rep. 143. S. C. accordingly.

22. A wife died poſſeſſed of *choſes en action*, and the huſband ſurvived, and died *without taking out letters of adminiſtration* to her, and the next of kin adminiſtered to her. It was held by Ld. Parker that the *adminiſtrator of the wife was but a truſtee for the executor of the huſband*, the right to the wife's choſes en action being by the ſtatute of diſtribution veſted in the huſband as next of kin of the wife; and ſaid, that this clauſe in the ſtatute was made in favour of the huſband, and not to his prejudice; ſo that it was intended by it that he ſhould be within the ſtatute of diſtribution ſo as to take the wife's choſes en action as to his benefit, but ſhould not be within the ſame as to his prejudice, and that this was not a new point but had been ſettled, and upon very good reaſon; for were it conſtrued otherwiſe he would be in a worſe caſe than the next of kin, though ever ſo remote, which the act did not intend. Wms.'s Rep. 381. cites Mich. 1718. Cart v. Rees. The reporter adds, that ſince this reſolution, the right of adminiſtration follows (includes) the right to the eſtate, and ought in caſe of the huſband's death after the wife to be granted to the next of kin of the huſband in the ſame manner as it is granted to a reſiduary legatee. Ibid. 382.

23. A. makes *C. executor and reſiduary legatee*, and B. makes *C. executor* without giving him the ſurplus. Afterwards *C. dies inteſtate*. A.'s perſonal eſtate ſhall go to the adminiſtrator of C. but B.'s ſhall go to B.'s next of kin, and who ſhall be his adminiſtrator; per Ld. C. Macclesfield. Ch. Prec. 567. Trin. 1721. in caſe of Farrington v. Knightley.

24. Notwithſtanding the ſtatute of II. 8. adminiſtrations have been granted to the principal creditor from the next of kin, by the opinion of both civil and common lawyers, where it is viſible that the next of kin cannot have any advantage or benefit of the eſtate, and this hath been always taken to be out of the ſtatute. Per Chancellor King. Mich. Vac. 1725. [ 88 ]

25. Maſter of the Rolls held, that if a *ſon dies inteſtate, or a wife*, the *huſband of ſuch wife, and the father of ſuch ſon, are intitled to the whole* of their perſonal eſtate, and to adminiſtration; and *if ſuch huſband or father dies before adminiſtration granted* to them, yet the perſonal eſtate of their inteſtate was an *intereſt veſted in them*, and ſhall be part of their perſonal eſtate, and *adminiſtration ſhall be granted to the repreſentative of ſuch huſband* or father; for the ſpiritual court *regards the property* in granting adminiſtration; and

the Maſter of the Rolls ſaid this point had been ſolemnly determined as above, Paſch. Vac. 1729. Bacon v. Bryant.

25. A *baſtard dies inteſtate without wife or iſſue*; the king is intitled, and ordinary of courſe grants adminiſtration *to the patentee* or grantee *of the crown*. 3 Wms.'s. Rep. 33. Hill. Vac. 1729. Jones v. Goodchild.

Ibid. ſays that the S. P. was ſo determined by Ld. C. Macclesfield, Mich. 1718. in the caſe of Cart v. Rees.

26. A *woman entitled to a choſe en action marries and dies*; the *huſband takes out adminiſtration* to her *and dies before the money is received*; adminiſtration is taken out to the huſband, and the money is paid to his adminiſtrator. Plaintiff takes out adminiſtration to the wife, and brings a bill againſt the defendant, who is adminiſtrator of the huſband, to repay the money by him received, and held that *it was a right veſted in the huſband immediately on the death of the wife*, and that *her adminiſtrator is only a truſtee for the huſband*, and her adminiſtrator bringing ſuch bill againſt the perſon for whom he is a truſtee is a breach of truſt, and diſmiſſed the bill with coſts. MS. Rep. May 18, 1737. Humphry v. Bullen.

## (K. 2) Adminiſtration de Bonis non.

### In what Caſes granted; and to whom.

1. IF an *executor dies inteſtate*, the *ordinary* ought to commit the adminiſtration, and he *may commit the adminiſtration of the firſt teſtator, and of the executor likewiſe, to one and the ſame perſon; but ſee now by the ſtatute of* 31 *H.* 8. that *it ſhall be committed to the next of kin*, and *adminiſtration may be de bonis non adminiſtratis*. Br. Adminiſtrator, pl. 45. cites 32 H. 6. 2. Lib. Intra' 145. 21 E. 4. 24.

2. *Obligor dies inteſtate.* Ordinary commits adminiſtration. Adminiſtrator makes his executor, and dies. Per Saunders, debt lies not againſt executor, but adminiſtration de bonis non ought to be granted to one againſt whom execution ſhall be ſued. D. 47. b. 12. and in Marg. Trin. 32 H. 8. Anon.

3. Teſtator *bequeathed all his goods after debts and legacies paid to A. B. whom he made executor. A. B. died before he proved the will.* Adminiſtration cum teſtamento annexo ſhall be granted to the next of kin of the ſaid A. B. or to ſuch other perſon or perſons to whom ſuch reſidue is bequeathed, otherwiſe to the next of kin of the firſt teſtator who demands it. D. 372. pl. 8. Mich. 22 & 23 Eliz. Iſted v. Stanley.

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2 Le. 58. pl. 147. Trin. 31 Eliz. B. R. Limver v. Evories, S. C. and the judgment was reverſed; for the plaintiff ought to bring his action as adminiſtrator of the firſt teſtator.

4. A. makes B. his executor, and dies. B. makes C. an *infant his executor*. D. as adminiſtrator of B. during the minority of C. cannot bring debt on a bond due to A. for by this adminiſtration D. has no authority to meddle with the goods of A. the firſt teſtator, and for this cauſe judgment was reverſed. Cro. E. 211. pl. 2. Hill. 33 Eliz. B. R. Limmer v. Every.

5. Huſband

5. Huſband and wife, as *adminiſtratrix*, *brought* an action of *debt againſt J. S. and declared that the inteſtate was adminiſtrator to M. G. who lent the money to the defendant.* After judgment for the plaintiff error was aſſigned, becauſe the action was brought by an adminiſtratrix of an adminiſtrator, whereas the *adminiſtration of the firſt inteſtate's eſtate ought not to have been newly granted to the next of kin*, and he to whom the adminiſtration of the goods of the firſt adminiſtrator is committed has nothing to do with them, and ſo judgment was reverſed. Goldſb. 182. pl. 118. Hill. 43 Eliz. Thorne's caſe.

6. *A. made B. and C. executors*, then *B. made J. S. executor, and died*, and afterwards *C. died inteſtate.* The *executor of B. ſhall not be executor of A.* but he is dead inteſtate, becauſe C. the ſurviving executor is ſo dead, and the executorſhip wholly and ſolely veſted in C. by the ſurvivorſhip, and ſo adminiſtration de bonis non ſhall be committed. Went. Off. Ex. 100.

7. Adminiſtration de bonis non, *during the minority of an executor*, is not within the ſtatute 21 *H.* 8. to be granted of neceſſity to the widow of teſtator, becauſe there is executor all the while; otherwiſe perhaps if the executor was made from a time to come. Hob. 250. pl. 329. Briers v. Goddard.

8. *Feme covert executrix dies inteſtate.* Adminiſtration may be to the next of kin of the firſt teſtator de bonis non. Jo. 176. Hill. 3 Car. B. R. Jones v. Roe.

1 Buiſt. 45. Smith v. Jones, S. P. —Where ſhe is reſiduary legatee in ſuch caſe to her huſband. 2 Vern. 249. Mich. 1691. Rouſe v. Noble.

9. *C. died inteſtate*, and one who was *debtor to him paid the money to his widow, with the aſſent of C.'s ſon, to whom the adminiſtration did belong, but afterwards it was granted to a ſtranger*, who ſued the debtor in the lord mayor's court; and there it was decreed that he ſhould pay the money to the adminiſtrator; but in the court of conſcience it was decreed that he ſhould not have it, becauſe it was already paid to thoſe who had the right of adminiſtration. Whereupon the adminiſtrator ſued out a procedendo ad judicium; but Hide Ch. J. Jones and Whitlock ſaid, that without a precedent they would not examine whether the decree was equitable or not; and they thought it ſhould be guided by the conſcience of the mayor, and would not examine it here ſo long as the Court below had not tranſgreſſed any rule of the common law. Latch. 190. Paſch. 3 Car. Cripps's caſe.

10 A. deviſed ſeveral legacies in money to ſeveral perſons, and after *all, the reſidue of my moveable goods and chattels to B.* his wife, and makes her *executrix*, and having divers *bond debts* due to him dies. B. *dies* the ſame day *before probate of the will.* Adminiſtration of the goods of A. cum teſtamento annexo was granted to C. next of kin to B. Adminiſtration to C. was revoked by delegates and granted to D. the next of kin of A. cum teſtamento, &c. becauſe by the deviſe of *all my moveable goods and chattels*, debts which are *jura were not deviſed*, therefore adminiſtration ſhall be granted to next friends of A. But if *all the goods, chattels, and debts*, were deviſed,

So where executor dies inteſtate adminiſtration ſhall be granted to the reſiduary legatee of the firſt teſtator. Vent. 316. cites Iſted's caſe, D. 372.

Jenk. 256. pl. 40 A. devises all his goods to B. and makes C. his executor. A dies. C. dies intestate. The administration of the goods of A. shall not be committed to the wife or next of blood of A. but to B. or it would be in vain. Frustra petis quod statim alteri reddere cogeris.

devised, and no residue, then otherwise. Jo. 225. Trin. 6 Car. B. R. Sparke v. Deane.

11. A. *freights a ship to the Indies* and makes his will, and B. executor, and dies. B. makes C. his executor and dies. *After the death of testator and executor the ship returns laden with silk.* These goods remaining in specie without any alteration, were in the same condition with the other goods of A. which did vest in B. by A.'s bequest, and ought to be disposed of as A. by his will directed his goods to be disposed of. Fin. R. 370. Trin. 30 Car. 2. Gundry v. Brown.

12. Lessee for years died intestate, his *administrator made an under-lease* to W. R. and died. Adjudged that his executor or administrator may have an action of debt for the rent arrear on the under-lease, and not the administrator de bonis non of the lessee, though he has the reversion, for he comes in by a title paramount to the lease. 3 Salk. 304. cites Vent. 259. [Pasch. 26 Car. 2. B. R. Norton v. Harvey.]

13. *Administrator de bonis non of the conusee of a statute agreed with conusor to assign it in consideration of a sum of money, covenanted by the conusor on the said agreement to pay him, his executors or administrators.* The *administrator died.* The Court decreed the money to be paid to the executor of the administrator, and not to the new administrator de bonis non, although before the extent it could not be assigned at law. Sed nota, that there were debts of the first intestate appearing. 2 Vent. 362. Pasch. 35 Car. 2. in Canc. Anon.

14. *Administration* was *granted in a peculiar to* the wife who was *the person intitled*, but because there were *bona notabilia* it was a wrongful administration, and such administrator, and dying intestate, administration de bonis non was granted to the goods of her husband the first intestate; but decreed an allowance of what she had paid in discharge of her husband's just debts. N. Ch. R. 173. Mich. 1691. Armstrong's case.

If an executor makes an executor and dies before probate of the will, the first testator is thereby dead intestate. Cro. J. 614. pl. 4. Pasch. 18 Jac. B. R. Hayton v. Wolfe.——Palm. 153. Heden v. Wolfe, S. C. held accordingly.

15. *Though an executor* had *administered, yet an immediate administration is committed if he dies before probate*, because the administering is an act in pais, of which the spiritual court cannot take notice, and they must commit administration according as it appears to them judicially, and not according to the fact, and yet the acts done by the executor are good; per Holt. 1 Salk. 308. Mich. 11 W. 3. C. B. in Wangford's case.

16. A. makes his will, and B. and C. executors, and left his wife principal legatory. B. and C. died intestate. The wife as *principal legatory* may take administration; but if she will not, her after-*husband* may, and though the wife and the after-husband were *divorced a mensa & thoro*, yet upon a *reconciliation*, though

but for a day, he ſhall be reſtored to the right notwithſtanding any decree during the divorce to the contrary. Gibb. 203. Hill. 4 Geo. 2. B. R. Vanthienen v. Vanthienen.

## (K. 3) Adminiſtration. [91]

### Grantable; to whom as next of Kin.

1. 31 *E.* 3. cap. 11. *WHERE a man dies inteſtate, the ordinaries ſhall depute the next and moſt loyal friends to adminiſter his goods, which deputies ſhall have action to demand and recover as executors the debts due to the inteſtate, and ſhall anſwer all other in the ſame manner as executors, and ſhall be accountable to the ordinaries as executors.*

2. 21 *H.* 8. *cap.* 5. *ſ.* 3. *In caſe any perſon die inteſtate, or the executors refuſe to prove the teſtament, then the ordinary ſhall grant adminiſtration to the widow, or the next of kin, or to both, by diſcretion of the ordinary, taking ſurety for true adminiſtration.*

*S.* 4. *Where divers perſons be in equality of kindred, the ordinary is to be at liberty to accept any one or more.*

Adminiſtration ſhall be granted to the father and not to the ſiſter of the inteſtate. 2 Show. 307. pl. 313. Trin. 35 Car 2. B. R. Copleſtone v. Copleſtone. —— S. P. and ſo to the mother before inteſtate's brother or ſiſter, becauſe the child proceeds immediately from the parent, and is otherwiſe of no kin to brother or ſiſter than as they proceed from the parent; per Holt Ch. J. 12 Mod. 622. ſays this is the reaſon of Ratcliff's caſe.

Where there is a mother and three ſons, and one dies inteſtate under age, it was often argued on a prohibition to whom adminiſtration belonged, whether to the other ſons as next of kin or to the mother; at laſt a conſultation was granted. 2 Show. 486. pl. 450. Mich. 1 Jac. 2. B. R. Palmer v. Allicock.

The mother ought to have the adminiſtration of her child before a ſon, a brother, or a ſiſter; for there is a nearer bond of nature between the child and the parents, than between the child and any other collateral tie of blood or kindred, and can never ſufficiently ſatisfy the obligation he hath to his parents for his being and education, eſpecially to his mother. L. P. R. 40. cites Vent. 414. (313.) and Molloy de Jure Maritimo, 364.

3. Charles duke of Suffolk had iſſue, a *daughter by the firſt venter, and a ſon by another venter*, and *deviſed goods to the ſon* and died, and after the *ſon died inteſtate without feme and without iſſue*, and the *mother of the ſon, who was of the ſecond venter, took the adminiſtration by the ſtatute of* 21 *H.* 8. which is, that the adminiſtration ſhall be committed to the next of kin of the inteſtate; and upon great argument in the ſpiritual court, as well by the common lawyers as by the civilians, the adminiſtration was revoked. Br. Adminiſtration, pl. 47. cites 5 E. 6.

The caſe was thus, The ſaid duke had iſſue Frances by the French queen, and after this feme died, and he married the daughter of the Ld. Willoughby, and had iſſue by her one Henry and died, and after Henry died without iſſue and without feme; and the mother of Henry took the adminiſtration, and after the ſaid Frances, wife of the marquis of Dorſet, ſued and reverſed the adminiſtration and obtained the adminiſtration to herſelf, though ſhe was only ſiſter of the half blood to the ſaid Henry, becauſe ſhe is next of kin to the ſaid Henry, inaſmuch as Henry has not any children; for the mother is not next of kin to her own ſon in this reſpect of this matter; for it ought to go by deſcent, and not by aſcenſion by the law of England and by the civil law, and the children are of the blood of the father and mother, but the father and mother are not of the blood of the children. And per Iſidore, pater mater & puer ſunt una caro, and therefore no degree is between them. Contra it is between brother and ſiſter, and the half blood is no impediment as to the goods. Br. Adminiſtrators, pl. 47. cites 5 E. 6. —— This caſe was utterly denied, 3 Rep. 40. a. Hill. 34 Eliz. in B. R. in Ratcliff's caſe.

So in a case between * Brown and Shelton of the goods of W. Rawlins Clerk, which was committed to Sir Humphry Brown who had married the sister of the said Rawlins, and after came W. Shelton and J. Shelton, son of the feme of the said Sir Humphry (which feme was the mother of the said Shelton by a former baron) and reversed the first administration, and obtained the administration to them; quod nota. Br. Administration, pl 47. ——— * Ibid. pl. 33. cites S. C.

† A niece of the whole blood sued in the spiritual court to repeal letters of administration committed to a brother of the half blood as being the next of kin, and cited Br. Administrators, pl. 47. But per Cur. these not being in equali gradu no prohibition ought to go, and it was denied per tot. Cur. 2 Keb. 533. pl. 43. Trin. 21 Car. 2. B. R. Pattenden v. Burgess.

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4. *A. J. was possessed of a term* for years, and *assigns it over to J. S.* being *brother to the wife of the said J. to the use of the wife. J. dies and makes his wife his executrix*, after which the said *wife takes R. W. to husband*, who takes the profits of the said lands during the life of the wife. *The wife dies intestate. J. S. as next of kin took administration as well of the goods of the said wife, as of her first husband.* By all the judges on a reference out of Chancery, the administrator had now as well the interest as the use of the said term as well in conscience as law, and R. W. shall not have it, because it is a thing in action, which the administrator of the wife shall always have, and not the husband, as if an obligation had been made to the use of the wife; and decreed accordingly. Poph. 106. Hill. 38 Eliz. Arthur Johnson's case.

5. *H. was possessed of lands for years under several leases*, and *having issue William and Thomas, he by his last will made William his executor and residuary legatee, after debts and legacies paid.* William *married and proved the will, but died intestate before the debts and legacies were paid*; judge of the prerogative court granted administration of the goods of H. to his other son Thomas, which he afterwards revoked, and granted it to the widow of William the intestate, from which sentence Thomas appealed, but it was resolved by all the commissioners that the *administration was rightly granted to the widow.* 2 Roll. Rep. 158. Hill. 17 Jac. B. R. Hinson v. Button.

6. *Feme covert executrix* dies intestate; administration may be to the next of kin of first testator de bonis non. Jo. 176. Hill. 3 Car. B. R. Jones v. Roe.

7. *A. is executor and residuary legatee*, and *dies before probate*; administration shall be granted to the next of kin of A. and not to the next of kin of testator. Dy. 372. pl. 8. Marg. cites Mich. 9 Car. C. B. Denn's case.

8. Ordinary may grant administration to *which he please* of kindred in equal degree. 1 Salk. 38. pl. 6. Pasch. 13 W. 3. B. R. Blackborough v. Davis.

Per Holt Ch. J. this case was, that the father took out administration for his son, and after a woman pretending to be the son's wife, would have it repealed; and there, upon a motion for a prohibition, it was held the ordinary by committing it to the father had executed his authority, for he had election which of them to grant it to. 12 Mod. 618. Hill. 13 W. 3. in case of Blackborough v. Davis. ——— But if a feme covert have several debts due to her before marriage which the law did not give to her husband; she dies, and her next of kin comes and takes out administration, the husband sues to have it repealed, and a prohibition is moved for and granted; and all this appearing on the declaration, it was held the prohibition should not stand, but the husband

9. Administration to *the father of the baron* and not the *wife*, and good by 21 H. 8. 5. Raym. 93. Hill. 15 & 16 Car. 2. B. R. Sand's case.

husband ought to have the administration; per Holt Ch. J. 12 Mod. 618. in case of Blackborough v. Davis, cites the case of Duncomb v. Lacy.

10. Administration of the goods of the son shall be granted to the *father* and not to the *son's sister*. 2 Show. 307. pl. 313. Trin. 35 Car. 2. B. R. Copleston v. Copleston.

11. Where a *person died intestate, leaving A. and B. his next of kin in equal degree to him, A. died intestate within the year, and before distribution.* The Court held that an interest was vested in him, and the act of parliament is the same as if the party had made his will to * this effect, like the case of a residuary legatee dying before probate of the will, his executor shall have administration, and not the next of kin to the first testator, and a consultation was granted per tot. Cur. Show. 2 and 25. Trin. 1 W. & M. in B. R. Brown v. Shore. Carth. 51. Brown v. Farndale and Shore S.C. & S.P. adjudged accordingly per tot. Cur. and a consultation awarded.

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12. Administration may be granted *to the wife or next of kin*, or of part to the one and part to the other, except of an intire debt which cannot be separated. 1 Salk. 36. Mich. 3 W. & M. in B. R. Fawtry v. Fawtry. 2 Vern. R. 125. Arg. cites Lady Butler's case, as in Ch. J. Hale's time, that the ordinary had not that latitude, but was bound to grant it to the wife if any was so. ——Per Glyn Ch. J. unless there was a special cause to the contrary, as where her husband made a former provision for her. Sty. 456. Pasch. 1655. Davis v. Matthews. —— Vern. 315. Pasch. 1685. Per the Solicitor General, the courts at law would prohibit the spiritual court from granting administration to the next of kin where there was a wife, and cites the cases of Thomas v. Butler, and Sir George Sands's case, but per North K. such prohibition, if granted were against the act of parliament, which leaves it to the ordinary to grant it to either.

13. If there be *grandfather, father, and son*, and the *father dies intestate*, the *son shall have the administration* and not the grandfather, though they be both in equal degree as to nearness of kindred, and says, that so is the opinion in Godolphin's case; Arg. 2 Vern. 125. Hill. 1690. in case of Crooke v. Watts.

14. Administration may be granted to the next of kin; or to the *wife*, or next of kin to the intestate, *as the spiritual judge pleases*; the wife shall come in for a share by the new statute, and as to creditors they are all one administrator; the Court may divide the administration, or give it all away as they please. But *husbands* shall have administration of the wife before all others; so if she has credits. 12 Mod. 16. Hill. 3 W. & M. Anon.

15. Administration granted to the *aunt* of intestate. *Grandmother* sued in the spiritual court for a repeal, prohibition denied. Lutw. 1055. Mich. 11 W. 3. Burton v. Sharp. Wms.'s Rep. 45. Pasch. 1701. in case of Blackborough v. Davies, mentions S. C. as cited by Sir Barth. Shower, where he calls her the great grandmother. [But this seems a mistake.] ——Ld. Raym. Rep. 686. in S. C. it is said per Cur. that Sir Bartholomew Shore cited S. C. of Burton v. Sharp the last Trin. Term. thus, viz. where an administration was sued to be granted to the great grandmother, and the aunt moved for a prohibition in C. B. to stay the suit in the spiritual court, and it was denied.

Administration granted to the grandmother, and mandamus prayed to the spiritual court to grant it to the aunt, but denied per Holt Ch. J. This is a matter contestable in the spiritual court, whereto she ought to apply herself; but the Court thought the advantage on the grandmother's side in this respect that she stands in lineo recto. 1 Salk. 38. pl. 6. Pasch. 13 W. 3. B. R. Blackborough v. Davies. ——Ibid. 251. Pasch. 1701. Held that the grandmother is nearer of kin than the aunt.

Brother and sister are nearer of kin than grandmother, and must come in before her, the aunt before the great grandmother, per Holt Ch. J. 12 Mod. 623. in case of Blackborough v. Davis.

16. The conſtruction of the ſtatute upon the *proximity* of degrees *muſt be according to the common law;* per Holt Ch. J. 12 Mod. 616. Hill. 13 W. 3. in caſe of Blackborough v. Davis.

17. If there be *grandmother, uncle, aunt,* and *grand-child dies,* the grandmother is intitled to the child's perſonal eſtate in excluſion of the uncle and aunt. It was clearly agreed. Ch. Prec. 527. Hill. 1719. Woodroff v. Wickworth.

18. By the *civil law* the *father or mother* make *one degree.* The *grandfather* or grandmother 2 *degrees,* and the *uncle* or aunt 3 *degrees;* but if you go one degree further, and reckon to the *great grandfather* or great grandmother, they are in equal degree with the uncle or aunt, as they are in the third degree, in direct lines
[ 94 ] with the uncle or aunt, who are in the third degree in the collateral line; for you muſt reckon through the grandfather or grandmother to come at the uncle or aunt, and then they are juſt in the ſame degree of remove from the nephew or niece in the *collateral* line, as the great grandfather or great grandmother are in the *direct aſcending* line; but the computation by the *canon law* is different; per Maſter of the Rolls. Ch. Prec. 593. Trin. 1722. Meutney v. Petty.

## (K. 4) Adminiſtration granted. To what Perſons. Perſons intereſted.

1. WHERE legacies are bequeathed, and *no executor named or refuſeth,* adminiſtration will be granted to him that has the reſidue of the goods. Arg. Cart. 136. cites D. 378.

2. *Reſiduary legatee* ought to have adminiſtration *before the next of kin;* per Cur. 3 Keb. 8. pl. 9. Paſch. 24 Car. 2. B. R. in Aſhton's caſe.

For it ſeems that this takes away the preſumption of the ſtatute that the teſtator would have given it to the next of kin.

3. The *teſtator gave a portion to his daughter, and made his wife reſiduary legatee, and W. R. executor,* and died, and afterwards the *executor died inteſtate.* The *daughter got adminiſtration without the wife's knowledge.* Afterwards the widow, the reſiduary legatee, ſued to repeal it; thereupon the daughter moved for a prohibition, ſuggeſting that there was no reſiduum for the widow. The Court ſtrongly inclined that no prohibition ſhould go, and held that the averment of no reſiduum is not material. And it would be to no purpoſe that adminiſtration ſhould be granted to the daughter (though ſhe was next of kin) when ſhe could have no benefit by it, the reſiduum being deviſed to the wife, therefore it is reaſonable that ſhe ſhould have the management of the eſtate to whom the reſiduum was deviſed. But the *adminiſtration having been granted five years before the reſiduary legatee came in, and the daughter having in that time got in great part of the eſtate by decrees in Chancery, and ſuits were depending there which were near ended, and*

2 Lev. 55. Thomſon v. Butler. S. C. but whether the alleging that there was no reſidue might take away the power of revoking, Curia adviſare vult; and the civilians then in court were divided as to that point. Afterwards the

*and which would be abated, &c. if the adminiſtration were repealed,* the *Court propoſed an accommodation* as beſt for the parties, and alſo for the eſtate; and the ſame was accepted. Vent. 217. Trin. 24 Car. 2. B. R. Thomas v. Butler.

parties agreed in court without any judicial determination.

4. H. P. died inteſtate, leaving *iſſue J. P. and A. P.* his perſonal eſtate being valued at about 3500 l. *A. P. agreed to take* 1500 *l. for her ſhare, and thereupon agreed that J. P. ſhould take adminiſtration, and releaſed her right to the perſonal eſtate. J. P. paid the* 1500 *l. and dies, and makes Y. his executor, and deviſes to him all his perſonal eſtate, there being* 1000 *l. out upon bond of H. P.'s eſtate.* The queſtion was, whether Y. the executor of the ſon, or A. the daughter, who was ſince married to W. ſhould have adminiſtration? and Dr. Raynes, the judge in the Prerogative Court, gave it to Y. whereupon W. and his wife appealed; and the delegates affirmed the ſentence in the Prerogative Court, becauſe they ſaid, that *Y. as executor of J. P. was intitled to all benefits of the perſonal eſtate of H. P. by reaſon of the agreement.* Freem. Rep. 496. pl. 671. Mich. 1689. Young v. Pierce. [95]

5. *Half blood, though an alien,* is capable of adminiſtration. Per Maynard Ld. Commiſſioner. 2 Vern. 126. Hill. 1690. cites Hinks's caſe.

6. *D. made M. his wife executrix and reſiduary legatee. M.* after *marries B.* B. dies, and *makes M. likewiſe executrix.* M. makes her will, and E. executor, and deviſes to E. and H. and G. all her goods, &c. which were A.'s. M. died, E. refuſed to adminiſter. Adminiſtration ſhall be granted to the next of kin of M. and not to the next of kin of D. and ſo ſhould it have been if M. had died before probate of D.'s will, and decreed to the deviſees whatever remained of D.'s eſtate; for whoever takes an adminiſtration to that are but *truſtees* for them. N. Ch. R. 172. Anon. But M. the executrix was firſt the widow of D.

## (K. 5) Adminiſtration.

### Debtor or Debtee.

1. *ADMINISTRATION was granted to an obligor;* afterwards *executor proves the will;* the *debt is not extinguiſhed* by the adminiſtration. Le. 90. pl. 115. Mich. 29 & 30 Eliz. C. B. Baxter v. Bales.

1 Salk. 303. S. P. by Powel J. in caſe of Wangford v. Wangford, it is only a ſuſpenſion of the action, and no extinguiſhment of the debt; but the reaſon of that is becauſe the commiſſion of adminiſtration is not the act of the obligee, and that ſo is 8 Rep. 136. Sir John Needham's caſe.

2. Obligee has taken adminiſtration *to one of the obligors.* He cannot ſue the other. Hutt. 128. cites Mich. 2 Jac. Trudgeon v. Meron, alias Heron.

3. Debtor

3. Debtor *deviſed his lands for payment of his debts*, but the ſame were not ſufficient. One of his creditors took adminiſtration. All creditors ſhall be paid alike out of the lands. But as to the perſonal eſtate, he may (according to law), ſo far as that goes, *prefer himſelf*, but no further. 2 Ch. Caſes, 54. 33 Car. 2. Gell v. Adderley.

## (K. 6) Acts done by Adminiſtrator where there is an Executor. Good or not.

Such adminiſtrator before the repeal ſold E. India ſtock, the purchaſor having notice of the fraud by which the adminiſtration was got, and knew his title, but deſired to be transferred back to the rightful adminiſtrator after the repeal, and the purchaſor being dead * his adminiſtrator was decreed to account. Fin. Rep. 430. Mich. 31 Car. 2. Johnſon v. Cheſter & al'. ——— 6 Rep. 18. b. Packman's caſe. S. C. ——— Cro. E. 459. pl. 5. S. C. the plaintiff diſcontinued the action.

1. ADMINISTRATION being granted to a ſtranger, the next of kin *ſues to repeal* it, *pending which the ſtranger ſells* the goods of the inteſtate, and after adminiſtration is repealed, and granted to the other. The ſale is good, yet by averment of *covin* it might be avoided. Mo. 396. pl. 517. Hill. 37 Eliz. Wilſon v. Pateman.

If an adminiſtrator ſells goods and pays debts with the money, and after he who is executor proves the will, he ſhall never avoid this ſale, for that it was done according to the will which the executors were compelled to do. Arg. Owen, 28. cites Griſbrook's caſe.

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Vent. 303. S. C. adjudged per tot. Cur. — 2 Lev. 182. S. C. adjudged. — 2 Jo. 72. S. C. adjudged. ——— 2 Mod. 146. S. C. adjudged the firſt ſale void. ——— Freem. Rep. 445. pl. 606. S. C. the Court inclined that the ſale by the firſt adminiſtrator was void, but that though it was a hard caſe, and might be fit for the parliament to conſider of it, yet they could not alter it. Et adjornatur.

2. Adminiſtrator *ſells* a term, and afterwards an *executor appears and renounces*, yet adjudged the ſale is void, but afterwards the executor renouncing, and another perſon being made adminiſtrator, a ſale by ſuch ſecond adminiſtrator was adjudged good. 2 Mod. 146. Hill. 28 & 29 Car. 2. B. R. Abraham v. Cunningham.

3. Adminiſtrator *ſells* a term *(charged with truſt) in truſt for himſelf;* adminiſtrator on a ſuit by *citation (not appeal) is revoked*, the aſſignment decreed to be ſet aſide, 2 Chan. Caſes, 129. Mich. 32 Car. 2. Jones v. Waller.

## (L) Adminiſtration Durante Minore Ætate.

### [*Actions and Pleadings.*]

[1. IN an *action of debt* againſt an adminiſtrator, if the defendant *pleads in bar a judgment had againſt him by* a ſtranger upon an obligation, and in the record he is named adminiſtrator durante minore ætate of J. S. who was then within the age of 21, ſcilicet, of the age of 18 and more, this is a good bar of action, for

for though the *full age* of ſuch *infant executor is* 16, yet if an action be brought *againſt the adminiſtrator after*, and this age of the infant appears to be paſt, yet if judgment be given *againſt the adminiſtrator, it is not void.* Adjudged per Cur. upon demurrer. Trin. 14 Car. B. R. GOOD AGAINST PINCENT. Intratur Mich. 13 Car. Rot. 449.]

[2. If adminiſtration be granted to A. durante minore ætate of B. *if it appears to the Court in pleading, that B. is of the age of* 16, the court ex officio ought to take notice of the eccleſiaſtical law that the adminiſtration is determined and void, per Jones, Croke, and Berkley; but Brampſton e contra. M. 14 Car. B. R. DAMPORT AGAINST PINCENT. Intratur Trin. 14 Car. Rot. 698. where the plaintiff declared, in action on the caſe, that defendant was adminiſtrator durante minore ætate of B. and in conſideration that the plaintiff would forbear him, &c. promiſed to pay the debt due by teſtator to the plaintiff, and defendant pleaded, that at the time of the promiſe made, B. was of the age of 16 years, and the three juſtices ſeemed to think that this was a good plea for the reaſon aforeſaid.]

Cro. C. 516. pl. 16. Davenport v. Penſell, S. C. Curia adviſare vult.

3. Some *bonds, in which the teſtator was bound, were aſſigned to the queen, who brought a ſcire facias againſt the infant executor*, and he *pleaded that S. and E. were adminiſtrators during his minority.* This was held to be no good plea. But he was ruled to anſwer as executor. Godb. 104. in pl. 122. cites Hill. 33 Eliz. in the Exchequer. Miller v. Gore.

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4. If the will be proved before the adminiſtration committed, the *action ſhall be in the name of the infant executor.* Per Periam J. Le. 155. pl. 216. Trin. 32 Eliz. C. B. in caſe of Ivory v. Fry.

5. Debt againſt an adminiſtrator durante minore ætate, and *pending the action the infant* executor *came to the age of* 17 years; the Court was in great doubt whether the action was abated or not. Moor, 462. pl. 648. Hill. 39 Eliz. Ford v. Granvill.

Goldſb. 136. pl. 38. S. C. adjudged a good plea. ——S. C. cited Lutw. 342. by the reporter as adjudged.

6. *M. an infant being made executrix by C. executor to E. adminiſtration of the goods of C. was granted to one F. durante minore ætate of M.* In an action againſt F. as adminiſtrator during the minority of M. the infant executrix, and found for the plaintiff, it was *moved in arreſt that F. the defendant ſhould have been named adminiſtrator de bonis E. not adminiſtered by C.* but adjudged well enough, becauſe the grant of the adminiſtration comprehends the goods of both. Hob. 246. pl. 311. Hill. 5 Jac. Norton v. Mollineux.

7. *Debt againſt an adminiſtrator durante minore ætate of T. P. the executor*, in which the *plaintiff declared* and averred, *that the ſaid T. P. was, and yet is, within the age of* 21 *years.* It was moved that the declaration was ill, becauſe it did allege that the executor was within the age of 21 years, whereas the adminiſtration durante minore ætate ceaſes at the age of 17 years, and *though he is not* 21, *yet he may be* 17 and more; and ſo was the opinion of all the juſtices, and judgment was ſtayed. 2 Brownl. 247. Paſch. 9 Jac. B. R. Bromehead v. Rogers.

8. The

8. The plaintiff's husband made an infant executor *to prevent payment of debts*, but he being not fit to undertake it, he made another administrator for him during his nonage, yet he liable for payment of debts. Toth. 173. cites Mich. 9 Jac. Lady Loppington v. Barnes.

9. In a *devastavit* such administrator shall be charged on the special matter. Lat. 160. 267. Trin. 2 Car.

Brownl. 101. S. C. in totidem verbis, and seems only a translation of Yelv.

10. *K. the mother, and J. her son an infant of one year old, were made executors, and administration was granted to her during the minority of her son.* She married again, and then her husband and *she (as executrix) brought an action of debt against the defendant, who pleaded in abatement that the infant was not named;* the *plaintiffs replied, that J. at the day of the writ purchased was, and yet is, under the age of* 17, and upon a demurrer to that plea it was held that the plea was good; *but if it had been set forth specially in the declaration that there was another executor under age, though not joined in the action, it might have been otherwise.* Yelv. 130. Trin. 6 Jac. B. R. Smith v. Smith.

The not averring so by administrator plaintiff had been bad, but it was cured by verdict. 2 Sid. 40. 60. Hill. 1657. Owen v. Holden.

11. *Account* was brought by the administrator durante minore ætate of J. S. against the defendant as bailiff of the manor, and found for the plaintiff. It was moved in arrest of judgment, because it was *not shewed that the infant was within the age of* 17 years; sed non allocatur. For it *shall not be intended* unless it be shewed *that he was above the age of* 17 years, and *especially when the defendant hath admitted the plaintiff to bring the action, and hath pleaded to issue.* Cro. C. 240. pl. 25. Mich. 7 Car. in B. R. Wells v. Somes.

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12. In *scire facias by executor during minority on recognisance made to himself, as bail to his first action on which he recovered,* the defendant *pleaded that after the recovery, and before the scire facias, the infant came of age,* to which the plaintiff demurred; and per Cur. *though it hath been doubted whether the infant may have scire facias, yet never whether the administrator may;* but this being a recognisance made to the administrator he must have the costs at least; & judic' pro quer'. 2 Keb. 877. pl. 46. Hill. 23 & 24 Car. 2. B. R. Emelies v. Weekes.

13. B. devises a legacy to C. and makes D. his executor and dies. D. makes E. an infant his executor and dies, and administration is committed to F. durante minore ætate of E.—C. the legatee sues F. in the spiritual court for his legacy, and F. moved for a prohibition, but the Court denied it; for although an administrator of an executor is not an administrator to the first testator, yet an *administrator durante minore ætate is loco executoris, and may be sued, as the executor of an executor may.* Freem. Rep. 288. pl. 335. Anon.

14. *Debt* was brought *against the widow as administratrix upon a bond of her husband.* She *pleaded in* abatement *that her husband made a will, and his son executor who was an infant, and that administration, with the will annexed, was granted to her durante minore ætate* of the infant executor, unde ex quo, &c. and upon a special

cial demurrer to this plea the plaintiff had judgment, becauſe the *defendant did not aver her plea by a hoc paratus eſt verificare.* 1 Lutw. 20. Mich. 2 Jac. 2. Little v. Plant.

15. It *hath been a great queſtion* in our books, *if the executor or adminiſtrator durante minore ætate continues the poſſeſſion of the goods after the full age of the executor, or waſtes them, how he ſhall be charged;* and there are ſeveral opinions. *Some held that he may be ſued as executor de ſon tort;* but this was denied by others, becauſe he comes to the poſſeſſion of the goods lawfully. *Others hold that he may be ſued as adminiſtrator durante minore ætate, becauſe a ſtranger cannot know the age of the rightful executor,* and *the only notorious act for diſcovering of this is, the ceaſing of the adminiſtrator durante minore ætate to intermeddle;* and of this opinion was Hob. to which Windham agreed. But ſeveral held that he may be charged upon the ſpecial matter diſcloſed; and this was not denied by any. Sid. 57. pl. 24. Mich. 13 Car. 2. B. R. Lawſon v. Crofts.

S. P. Hob. 265, 266. pl. 349. Hill. 17 Jac. Chandler v. Thomſon, debated by the Court, how the creditor ſhould be relieved, the new executor taking upon him the executorſhip; for the goods never came to the hands of the new executor, though perhaps he may have an action againſt the former executor, for ſo much as he did not lawfully adminiſter; for againſt the vendees he can have no remedy, or elſe the old executor may remain an executor ſtill for that purpoſe, the other being none in effect for thoſe goods, like the caſe of a ſheriff that does not deliver his priſoner, that he has in execution, to the next ſheriff.

16. Adminiſtrator de bonis non durante minore ætate of Rebecca Wood, brought action of *covenant againſt the huſband and wife who was executrix of the former huſband,* &c. and averred that Rebecca was under age; the defendants *plead in bar, that after the laſt continuance Rebecca came of age;* the plaintiff demurred, but it was never argued, for he could not maintain it, the plea being good, for as ſoon as Rebecca came of age the action was determined. Lutw. 338. Mich. 3 W. & M. Major v. Peck.

17. And in a *ſcire facias* brought *by an adminiſtrator durante abſentia* of another, upon oyer of the ſcire facias, the defendant demurred, and exception was taken that the adminiſtration was void. But the Court *held* clearly that this adminiſtration was good, and *that payment of the debt to ſuch adminiſtrator, after the return of the next of kin, and before notice, is good,* and that though actions brought by ſuch an adminiſtrator ſhall abate when the right perſon comes, but actions brought againſt him ſhall not, but ſhall be continued againſt the rightful adminiſtrator. Lutw. 342. cited by the reporter as adjudged Paſch. 3 W. 3. B. R. Clare v. Hedges. [99]

18. *But* if ſuch adminiſtrator be plaintiff and does not aver it, the defendant *by pleading admits the authority of the plaintiff* to bring action. Lutw. 632. Hill. 9 W. 3. Beale v. Simpſon.

Ld. Raym. Rep. 408. 413. S. C. & S. P. agreed per tot. Cur. and judgment accordingly.

19. Action againſt adminiſtrator durante minoritate *as general adminiſtrator,* he pleads in abatement that he was but a ſpecial adminiſtrator during minority of his wife, but did not *aver that ſhe was ſtill under age,* and for that reaſon there was judgment againſt him to anſwer over. Carth. 432. Mich. 9 W. 3. B. R. Sparks v. Crofts.

Ld. Raym. 265. S. C. & S. P. accordingly.

20. Then

Ld. Raym. Rep. 265, 266. S. C. & S. P. accordingly by Holt Ch. J.

20. Then he pleaded in bar that *puis darrein continuance the infant died*, which was from the laſt term; but it was over-ruled, becauſe it was contrary to what was now admitted on record, ſo judgment was given againſt him. Carth. 432. Mich. 9 W. 3. B. R. Sparks v. Crofts.

## (L. 2) Adminiſtration Durante Minore Ætate.

### In what Caſes grantable; and to whom.

1. SUCH adminiſtration cannot be granted *after* 17, and if it is, it is void. 5 Rep. 29. Hill. 41 & 42 Eliz. C. B. in Prince's caſe.

2. If one makes *two executors, one* 17 *years*, and *the other under*, adminiſtration during minority is void, becauſe he of 17 may execute the will. Brownl. 46. Mich. 14 Jac. Anon.

3. Such adminiſtration is not within the ſtatute of 21 H. 8. to be granted of neceſſity to the widow of the teſtator; becauſe there is an executor all the while; but otherwiſe perhaps if the *executor* were *made from a time to come*. Per Cur. Hob. 250. pl. 329. in caſe of Briers v. Goddard.

4. Adminiſtration during minore ætate cannot be granted if *one* of them *is of full age*. Per Twiſden. Mod. 47. Mich. 21 & 22 Car. 2. B. R.

2 Jo. 119. S. C. ſays that no judgment was given, as he thinks; for Wright the defendant being a pleader at the bar, the Court diſapproved his conteſt againſt a manifeſt

5. Where *one of the executors is an infant* and cannot prove the will, adminiſtration durante ſua minoritate may be granted to the other, who ſhall bring the action alone, and it is not inconſiſtent that he ſhall adminiſter in ſuch caſe; for this is not granted as upon a dying inteſtate, (for the will is proved), but only to enable him to ſue alone, becauſe the other is not capable to prove the teſtament, and ſo not to join with him, and he cannot ſue alone; reſolved per Cur. 2 Lev. 239, 240. Hill. 30 & 31 Car. 2. B. R. Colborne v. Wright; and cited the caſe of HATTON v. MASCUE, entered 15 Car. 2. in B. R. Rot. 703. the roll of which was brought into court, and appeared to be ſo adjudged.

duty, and thereupon he agreed the cauſe as the reporter thinks. But if he ſues in his * own name only, and names not the infant, the action will abate. Brownl. 101. Trin. 6 Jac. Smith v. Smith.——Yelv. 130. S. C. & S. P. adjudged. ——S. P. by Twiſden J. Mod. 47. Hill. 21 & 22 Car. 2. B. R.

* [ 100 ]

Skinn. 155. pl. 3. Hill. 35 & 36 Car. 2. B. R. the S. C. argued, and the Court inclined that the prohibition ſhould

6. The *brother died inteſtate, leaving one ſiſter an infant*, whoſe *great grandmother was aſſigned her guardian, and thereupon ſhe obtained adminiſtration durante minore ætate;* and now the plaintiff in the prohibition, who was *the grandfather to the infant, ſuggeſted, that the adminiſtration was granted by ſurprize, and that he being nearer of kin, adminiſtration ought to be granted to him.* It was argued that it is not material who ſhall be adminiſtrator, for it being durante minore ætate, he has no power over the eſtate;

that ſince *the ordinary* has no original power in this caſe, and this being a ſpecial kind of adminiſtration, when he has once executed that power he *ſhall not repeal it;* and the Court inclined to that opinion. 3 Mod. 23. Mich. 34 Car. 2. B. R. Ld. Grandiſon v. Counteſs of Dover.

ſtand; and upon a further argument the Court were of the ſame opinion,

and denied that the ordinary without cauſe could repeal an adminiſtration before the ſtatute of H. 8.

7. *Before the ſtatute of E.* 3. there was *no adminiſtrator durante minore ætate; but* in caſe *where an infant was made executor;* but *now* there is an adminiſtrator durante minore ætate where an infant is *adminiſtrator*, as well as where he is executor. Arg. Skin. 155. Hill. 35 & 36 Car. 2. B. R. in caſe of Ld. Grandiſon v. Counteſs of Dover.

8. Where a man makes an infant of tender years executor, if adminiſtration durante minore ætate be *granted* ſpecially *ad opus commodum & utilitatem* of the infant, there the adminiſtrator cannot make a *leaſe*. *But* if it be granted *generally*, *ratione minoris ætatis*, he may recover debts and duties, and make leaſes, which ſhall be good until the executor comes to 17, and alſo (as ſome ſay) till he enters; 6 Rep. 67. a. But per tot. Cur. where adminiſtration is granted durante minore ætate, there adminiſtration ſhall not *determine* until the party come to 21 *years* of age; becauſe the ſtatute for granting of adminiſtrations requires adminiſtrators to give bond, which an infant cannot do. L. P. R. 41, 42. cites Paſch. 8 W. in B. R.

10. The ordinary may *grant* adminiſtration during minore ætate *to whom he pleaſes*. Gibb. 163. Mich. 4 Geo. 2. B. R. The King v. Bettesworth.

11. An adminiſtration durante minore ætate *ought not to be committed to one that is very poor, though ſhe is guardian and next of kin to the infant.* Where this Court ſees reaſon to think, that there will be a miſapplication of the effects of the inteſtate, and an abuſe and waſting, to the prejudice of an infant, by a limited adminiſtrator, who is only a truſtee for the infant, it is incumbent on this Court to take care that the infant be not prejudiced. And *the Court will appoint a receiver of a perſonal eſtate, notwithſtanding adminiſtration is granted of it.* Barnard. Chan. Rep. 23, 24. Paſch. 1740. in the caſe of Havers v. Havers.

## (L. 3) Adminiſtrator Durante Minore Ætate. [ 101 ]

### When ſuch Power determines; and the Effect thereof.

1. *ADMINISTRATORS, during the minority, had judgment in debt, and before execution ſued, the executor came to his age of* 17 years; and how this execution ſhall be ſued comes the queſtion, for the power of the adminiſtrator was determined by the attaining of age of 17 years by the executor, and the executor

was

was not party to the record, and for that he could not ſue execution, but *it ſeems that the executor may ſue ſpecial ſcire facias upon the record, and ſo ſue execution in his own name.* 2 Brownl. 83. Anon. ſays ſee 27 H. 8. 7. a.

The difference is where the adminiſtration is granted during the minority of an infant executor, or an infant adminiſtrator; in the firſt caſe it ceaſes at 17, but in the laſt caſe not till 21. 1 Salk. 30. pl. 7. Paſch. 13 W. 3. B. R. Freak v. Thomas. —— Ld. Raym. Rep. 667. S. C. the ſame diverſity by Holt Ch. J.

2. Adminiſtration durante minore ætate of an infant executor *ceaſes at* 17. 5 Rep. 29. a. Hill. 40 Eliz. C. B. Piggot's caſe.

This caſe was denied per King C. aſſiſted per Raymond Ch. J. and held that adminiſtration does not ceaſe by executrix under 17 taking baron of full age. Mich. 1730. Ld. Stratford v. Jones. —— And they cited Went. Off. of Executors, 213. which book they ſaid was wrote by Judge Dodderidge. (See this caſe reported 2 New. Abr. 382.) —— 3 Wms.'s Rep. 88. Jones v. Ld. Strafford, S. C. and held by Ld. Ch. King and Ld. Ch. J. Raymond contrary to the opinion in 5 Rep. in Prince's caſe, and obſerved that the ſame is not taken notice of in any other co-temporary reporters, as in 2 And. 132. Cro. Eliz. 718, 719. and 3 Le. 278. and that the book intitled The Office of Executors marvels at the report in 5 Rep. and ſays, that he has ſeen the caſe otherwiſe reported in this point.

3. *Infant executrix* takes baron before 17. Adminiſtration durante minore ætate ſhall ceaſe if the baron be of full age. 5 Rep. 29. b. Mich. 41 & 42 C. B. Prince's caſe.

4. If adminiſtration be granted during *minority of two infants*, and *one dies*, yet the adminiſtration continues. Brownl. 47. Paſch. 10 Jac. Anon.

Though it was objected that by the new act concerning adminiſtration the executor is to give bond, and that he cannot do before he is 21, and the Court will not grant adminiſtration to him ſince that ſtatute, and ſo the teſtator's debts will not be recoverable; but notwithſtanding the Court gave judgment againſt the plaintiff; and Wild ſaid, though he cannot give bond himſelf yet he may be bound by his ſureties. Freem. Rep. 425. pl. 569. Paſch. 1676. Taylor v. Watts, S. C. —— But L. P. R. 41, 42. cites it as held per tot. Cur. Paſch. 8 W. 3. B. R. that it ſhall not determine till the party comes to 21, becauſe the ſtatute for granting adminiſtrations requires adminiſtrators to give bonds, which an infant cannot do. —— S. P. cited Arg. as adjudged in B. R. accordingly, and agreed by the other ſide. Le. 74. pl. 101. Paſch. 29 Eliz. C. B. —— Brownl. 46. S. P. accordingly. —— 5 Rep. 9. Trin. 34 Eliz. B. R. in Brudeneil's caſe, S. P. but no reſolution.

5. Adminiſtration is granted *durante minore ætate of ſix.* When *one of them comes to the age of* 17, the adminiſtration ceaſes, and the law in this point is not altered by the ſtatute of 22 & 23 Car. 2. and judgment accordingly. 2 Jo. 48. Paſch. 28 Car. 2. B. R. Joyner v. Watts.

* [ 102 ]

5 Mod. 395. S. C. —— Comb. 475. S. C. and ſame difference per Holt Ch. J. becauſe an executor by the civil law may take that office upon him at 17, but an adminiſtrator being created by ſtatute, the time of his full age muſt according to the common law. —— Carth. 446. S. C. adjudged accordingly. —— 1 Salk. 29. pl. 7. Paſch. 13 W. 3. B. R. Freke v. Thomas S. P. adjudged accordingly. And the reporter ſay, note a neceſſity for this; for the ſpiritual court will not grant adminiſtration to any one under 21, and this is by conſtruction of the ſtatute of diſtributions, becauſe they are to give bond, &c. —— Ld. Raym. Rep. 338. cites S. C. as adjudged. —— 12 Mod. 501. Reek v. Thomas S. C. adjudged accordingly. —— S. P. per Cur. Comyns's Rep. 112. pl. 72. Paſch. 13 W. 3. B. R. in caſe of Freke v. Thomas. —— Comyns's Rep. 159, 160. Trin. 7 Ann. C. B. Edmonds v. Shafer, the S. P. accordingly.

6. The diverſity is, if adminiſtration be granted durante minoritate *of an executor*, there the adminiſtration ſhall ceaſe when the executor comes to 17; but if the adminiſtration be granted durante minoritate of one who is not an executor, but only *adminiſtrator*, there * adminiſtration durante minore ætate does not ceaſe till 21. Jud' pro quer' per Cur. 12 Mod. 194. Paſch. 10 W. 3. Atkinſon v. Corniſh.

7. If

7. If an infant executor, after 17 years of age, *aſſents to a legacy before the debts are paid*, the aſſent is void; or if he do *any act that will be a devaſtavit*, or a waſting of the goods in another executor of full age, it ſhall *not bind* him. R. S. L. vol. 1. 44. cites Wood's Inſt. 558. If infant executor aſſents to a legacy before 17, it is of no force to make it ſettle in the legatee. Went. Off. Executors, 213, 214.

8. An adminiſtration is granted *during the minority of four* infant children, *one of whom, being a daughter, marries an huſband who is of age*. The adminiſtration is not determined. 3 Wms.'s Rep. 81. Mich. 1730. Jones v. Com' Strafford & al'.

9. If adminiſtration be granted *during the minority of four* infants, and *one dies, this does not determine the adminiſtration*; contrary to the opinion in 5 Rep. Brudenel's caſe. 3 Wms.'s Rep. 89. Mich. 1730. Jones v. Com' Strafford & al'. Brownl. 47. S.P. accordingly.

## (M) Adminiſtrator durante Minore Ætate.

### The Power of ſuch Adminiſtrator.

[1. ADMINISTRATOR durante minore ætate may *ſell the goods* of the teſtator, and *pay debts, and do all other things which an executor may*. P. 42 El. B. R. per Cur.]

[2. An adminiſtrator durante minore ætate may have an action of *trover and converſion* of goods of the teſtator, for he has more than the bare cuſtody of them, for he has the property itſelf. Adjudged P. 42 Eliz. B. R. per Cur. SETHE AGAINST SETHE.]

[3. If an adminiſtration durante minore ætate be *repealed, and another made adminiſtrator durante minore ætate*, and the ſecond adminiſtrator *brings the firſt adminiſtrator to account, and after releaſes* to him, yet the infant at full age may compel the firſt adminiſtrator to *account again* to him, * and the firſt account to the ſecond adminiſtrator, and his releaſe ſhall not be any bar of it; for the *releaſe* of ſuch adminiſtrator is not good unleſs it be for ſuch cauſe for which he ought to make it. Mich. 10 Ja. per Cur.] * Fol. 911.

4. An adminiſtrator durante minore ætate of an infant executor had *judgment* in an action of *debt* brought by him for money due to the teſtator, and *the defendant being in execution, the infant executor came of full age*. It was moved that he might be diſcharged out of priſon, becauſe the authority of the adminiſtrator is now determined, and he cannot acknowledge ſatisfaction, nor make acquittances, &c. Windham and Rhodes held, that the recovery and *judgment was ſtill in force, but the party might be relieved by an audita querela*. Godb. 104. pl. 122. Mich. 28 & 29 Eliz. C. B. Anon. [ 103 ]

5. Adminiſtrator during minority of an executor cannot *grant a term* of which teſtator died ſeiſed *during minority of executor*, for he has but a ſpecial property ad proficuum executoris, but not a general property as another executor or adminiſtrator has, and therefore his *ſale of goods*, unleſs they are bona peritura, or if it be for *neceſſity* for payment of debts which he is chargeable to pay, ſhall 2 And. 132. pl. 78. S.C. accordingly, but that he may ſell fat beaſts or grain, &c. —5 Rep 29. b. Prince

v. Simpſon, S. C. —— He is rather a bailiff to the infant than an adminiſtrator, S. C. ——

ſhall not bind; but he may ſue and be ſued, and yet his is but a limited authority, and like one that has letters ad colligendum, &c. there he may ſell bona peritura as fruit, &c. Cro. E. 718. pl. 46. Mich. 41 & 42 Eliz. C. B. Price v. Simpſon.

per Windham and Rhodes J. 3 Le. 278. pl. 367. Mich. 35 Eliz. C. B. ſeems to be Godb. 104. pl. 122. Mich. 28 & 29 Eliz. S. P. by Windham and Rhodes J.

Whether ſuch adminiſtrator's aſſenting to the deviſe of a term is good was doubted.

6. Adminiſtrator during minore ætate cannot *aſſent to a legacy* unleſs there be aſſets to pay debts. 5 Rep. 29. b. Hill. 41 & 42 Eliz. C. B. Prince's caſe, alias Price v. Sympſon. Cro. E. 719. Price v. Simpſon.

7. Adminiſtrator durante minore ætate of a *leaſe* to commence after the death of lady M. *demiſes it* for 10 years (the infant being three years old), adjudged a good leaſe, and it enured as an *intereſſe termini* to commence after the death of lady M. but if adminiſtration be granted *ſpecially*, as in the caſe 5 Rep. 29. b. in PRINCE'S CASE, viz. adminiſtrationem omnium bonorum ad opus, commodum & utilitatem executoris durante minore ætate & non aliter nec alio modo, &c. ſuch ſpecial adminiſtrator cannot make ſuch demiſe. 6 Rep. 67. b. Mich. 4 Jac. C. B. Sir Moile Finch's caſe.

Roll. tit. Execution (P), pl. 1. cites S. P. adjudged Mich. Jac. C. B. Wright's caſe. ——

8. If ſuch adminiſtrator *recover in debt*, and then the executor comes of age, he ſhall ſue execution. Cro. C. 227. Arg. cites 9 Jac. C. B. Preſt's caſe.

S. C. cited Lutw. 344.

9. If teſtator makes an infant executor and appoints B. to be *executor during his nonage*, expreſſing it to be *only for the benefit of the infant executor*, he doubts whether this temporary executor ſtands any whit reſtrained from what pertains to the power of an abſolute executor, and diſtinguiſhes between an executor ſo made by the very proprietor of the goods, and an adminiſtrator during minority conſtituted by the ordinary. Went. Off. Executor, 214.

10. Keeling conceived, that *ſince* 21 *H.* 8. *cap.* 5. the caſe of *adminiſtration during minority of one next of kin, and to his uſe and profit, is now merely as a bailiff, and all one with an adminiſtrator during minority of an executor, and ſo his releaſe is not good*, he having but a bare authority; and to this whole Court agreed, Windham abſente; judgment for the plaintiff niſi. 2 Keb. 30. pl. 62. Paſch. 18 Car. 2. B. R. Thackſtone v. Hulmlocke.

In caſe of ſale of ſtock in the Eaſt India Company by ſuch adminiſtrator, and the buyer having full notice that it was the ſtock of the infant, the ſale was decreed to be fraudulent.

11. Adminiſtrator durante minore ætate cannot *ſell leaſes* unleſs there is not ſufficient otherwiſe to pay the debts of teſtator, or other reaſonable cauſe. 2 And. 132. pl. 78. Mich. 41 & 42 Eliz. Prince v. Simpſon. Fin. R. 298. Paſch. 29 Car. 2. Munn v. Dunkin.

[ 104 ]

Ibid. 475. Ld. Keeper aſked the

12. A *ſuit begun by* ſuch adminiſtrator is *determined by the age of the infant*, ſo that the infant muſt begin de novo *unleſs a decree be made*,

*made*, and then if an account be before a maſter, the infant on a bill by him for that purpoſe may be allowed to proceed; per Ld. Wright. Ch. Prec. 174. pl. 145. Mich. 1701. Jones v. Baſſet.

bar if any ſuch thing had ever been done, and it was anſwered

that the like had once been done by Ld. C. Somers in the caſe of DAVIS v. DAVIS, where an adminiſtrator durante minore ætate proceeded to a decree and account before the Maſter, and then the infant coming of age and praying, it was allowed to go on though much oppoſed, but here it would not be granted; for Davis's caſe had proceeded to a decree, and though the plaintiff there was an adminiſtrator durante minore ætate, yet it was cum teſtamento annexo, which by him made ſome difference; and the infant there had brought a bill to have the benefit of the ſaid proceedings, and offered to be bound by them.

## (M. 2) What Actions Adminiſtrator Durante Minore Ætate, or other temporary Adminiſtrators, may bring, or be liable to; and of Pleadings by them.

1. HE cannot bring an *action of debt*; for he is but a ſervant or bailiff in ſuch caſe. Per Dyer. Ow. 35. Mich. 13 & 14 Eliz. Anon.

S. P. by Windham J. to which Rodes agreed.

Godb. 104. pl. 122. Mich. 28 & 29 Eliz. C. B.

2. Note, it was ſaid by Dyer, that an adminiſtrator durante minoritate cannot *bring action of debt*; for he is but as a ſervant or bailiff in ſuch caſes. Ow. 35. Mich. 13 & 14 Eliz. Anon.

But the contrary ſeems admitted; judgment

being given againſt him for not averring that the executor infant was under the age of 17, ſee 5 Rep. 29. Hil. 40 Eliz. C. B. Piggot's caſe. ——— Cro. E. 602. Pigot v. Gaſcoyn and Furthee, where the caſe was, that the teſtator made an infant executor, the plaintiff took out adminiſtration durante minore ætate, &c. and brought an action of debt on a bond due to the teſtator, and averred that the infant executor was living and within the age of 21 years; now becauſe it did not appear that this adminiſtration was granted whilſt the infant was under 17 years, therefore the plaintiff was nonſuit. ——S. C. cited per Cur. 5 Mod. 305. Paſch. 10 W. 3. in the caſe of Atkinſon v. Corniſh.—— S. C. cited Brownl. 46.——S. C. cited Freem. Rep. 425. pl. 596. Paſch. 1676.

3. Adminiſtrator during minority *cannot ſue or be ſued* by the common law. Per Periam J. 4 Le. 103. pl. 209. Mich. 27 Eliz. C. B. in caſe of Kightley v. Keightley.

Per Dyer Ch. J. he cannot bring an action of debt.

Ow. 35. Mich. 13 & 14 Eliz. Anon.

4. Adminiſtrator during minority *of an executor* brought an action of *debt on bond to firſt teſtator*; but having brought it as adminiſtrator of the firſt executor, it was held ill, for he ſhould have brought it as adminiſtrator of the firſt teſtator, and for that reaſon the judgment was reverſed in error. 4 Le. 58. pl. 147. Trin. 31 Eliz. B. R. Limver v. Evory.

Cro. E. 211, 212. pl. 2. Limmer v. Every, S.C. adjudged, and judgment reverſed accordingly.

5. Such general adminiſtrator durante minore ætate ſhall have *action to recover debts* and duties (for the intereſt of the actions is in him, and ſhall be liable to all actions, for during the time the teſtator died quaſi inteſtatus), and he may *make leaſes* and demiſes,

and they ſhall be good till the executor is 17, and ſome ſay till he enters. 6 Rep. 67. b. Mich. 4 Jac. C. B. Sir Moile Finch's caſe.

† Orig. is (did not.) —— Yelv. 128. Trin. 6 Jac B.R. Croft v. Walbanke,

* 6. An action was brought *againſt adminiſtrator durante minoritate* of an executor, and did *not aver that the executor was ſtill under* 17, and the opinion was that he † need not. But *otherwiſe of plaintiff* being ſuch an adminiſtrator. Hob. 251. Hill. 13 Jac. Rot. 970. Carver v. Haſlerig.

S. P. adjudged that the plaintiff need not ſhew it, becauſe he is a ſtranger to the power given to the defendant, and may not know what age the infant is of; beſides the defendant by joining of iſſue in this caſe did admit that his power continued; for otherwiſe the exception taken by the plaintiff ſhould be pleaded by the defendant in diſcharge of himſelf, it lying properly in his notice, and it being for his own benefit to allege it. —— 2 Roll. Rep. 209. Mich. 18 Jac. B. R. Aldred v. Walthall, S. P. —— Cro. J. 590 pl. 12. Walthall v. Aldrich, S. C. & S. P. held accordingly. —— Roll. Rep. 400. pl. 28. Trin. 14 Jac. B. R. Hall v. Salvin and Damport, S. P. adjudged and affirmed in error.

7. The Court did ſeem to agree, that *if an executor durante minore ætate* do *pay debts as an executor ought to do, and for what remains in his hands, if he account for it, and deliver it over to the heir*, yet *he ſhall not* be *chargeable to any of the creditors*. Freem. Rep. 150. pl. 171. Paſch. 1674. Anon.

8. The declaration was as adminiſtrator during minore ætate *of three, whereas the adminiſtration was granted during the minority of four*, and it did not appear whether the fourth was alive or not, or within the age of 17; whether this be good after verdict? and the Court ſeeming to be divided, the defendant agreed to accept a new declaration. Sid. 185. pl. 8. Paſch. 16 Car. 2. B. R. Bennet v. Baud.

9. B. deviſes a *legacy to C.* and *makes D. his executor, and dies; D. makes E. an infant his executor, and dies*, and *adminiſtration is committed to F. durante minore ætate of E.*—C. the legatee ſues F. in the ſpiritual court for his legacy; and F. moves for a prohibition; but the Court denied it; for although an adminiſtrator of an executor is not an adminiſtrator to the firſt teſtator, yet an *adminiſtrator durante minore ætate is loco executoris, and may be ſued as an executor of an executor may*. Freem. Rep. 288. pl. 335. Trin. 1675. Anon.

4 Mod. 14. Hill. 2 W. & M. in B.R. Hodge v Clare, S. C.—— 6 Mod. 364. cites Lutw. 342. S. C. and 4 Mod. 14. but ſays that as it is reported in 4 Mod. it is not law, nor agreeable to the roll. But

10. In a ſcire facias brought by adminiſtrator *durante abſentia of another*, the defendant on oyer of the ſcire facias demurred, and exception was taken that ſuch adminiſtration was void; but the Court held clearly that ſuch adminiſtration was grantable by law, and that it may be a great conveniency ſo to do; for if *the next of kin* be *beyond ſea*, and ſuch adminiſtration could not be granted, the debts due to the inteſtate might be loſt. And the Court held likewiſe, that *after the return of the next of kin a payment of a debt to ſuch an adminiſtrator before notice is good*. And further, that though perhaps actions brought by ſuch adminiſtrator ſhall abate by the return, &c. yet actions againſt him ſhall not. Cited by Serjeant Lutwich. Lutw. 342. as adjudged. Paſch. 3 W. & M. in B. R. Clare v. Hedges.

ſays, that ſure it ought to be averred that the abſence continues according to 5 Rep. Pigot's caſe.—— It ought to be averred that the party was then at ſuch a place out of the realm. L. P. R.——2 Ld. Raym. Rep. 1071. cites 4 Mod. 14. Hodge v. Clare, and ſays, that upon ſearch of the roll in that caſe, there is a full averment that the perſon, during whoſe abſence, was in partibus tranſmarinis, and

no

no ground for the objection. The Ch. J and Powell ſaid, that the adminiſtration durante abſentia muſt be intended of an abſence out of the realm, and therefore the adminiſtrator plaintiff in his declaration ought to aver, that the executor is out of the realm. And the Ch. J. ſaid, that it was reaſonable there ſhould be ſuch an adminiſtrator, and that this adminiſtration ſtood upon the ſame reaſon as an adminiſtration durante minore ætate of an executor, viz that there ſhould be a perſon to manage the eſtate of the teſtator, till the perſon appointed by him is able. And he ſaid, upon the obſervation upon 4 Mod. ſee the inconveniencies of theſe ſcambling reports, they will make us appear to poſterity for a parcel of blockheads. 2 Ld. Raym. Rep. 1071, 1072. Mich. 3 Ann, in the caſe of Slater v. May.

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11. An *adminiſtrator pendente lite of a will* brought an aſſumpſit on a promiſſory note, and recovered judgment in C. B. and upon error brought in B. R. judgment was affirmed, and it was held that the ordinary had power to grant ſuch adminiſtration, and that the reaſon is the ſame as to that of adminiſtration durante minore ætate, to prevent the many inconveniences which otherwiſe might happen, as loſs of debts, &c. 2 Wms.'s Rep. 576 to 590. Trin. 1731. Walker v. Woollaſton.

Gibb. 202. Wollaſton v. Walker. S. C. adjornatur. Ibid. 257. S. C. adjornatur. But the reporter ſays, it probably was for no other end than that the judgment of the Court might be unanimous in the determination of this point, one judge not agreeing with the reſt. ——— Barnard. Rep. in B. R. 422. S. C. adjornatur, and ibid. 467, 468. S. C. Three juſtices ſeemed very clear of opinion to affirm the judgment, but one juſtice doubting upon an authority in Carth. 153. where ſuch adminiſtration is expreſsly reſolved to be void, the matter was ordered to ſtand over. ——— 2 Barnard. Rep. in B. R. 14. adjornatur. Ibid. 62. S. C. and judgment affirmed.

## (M. 3) Durante Minore Ætate.

### After Judgment recovered, and before or after Execution Executor comes to 17, what is to be done.

1. ADminiſtrator durante minore ætate of K. had judgment on a bond made to the teſtator. Afterwards K. *the executrix came of age and married*, and then *ſhe and her huſband brought a ſci. fa. on that judgment.* The better opinion of the Court was, that the ſci. fa. did not lie. Brownl. 59. Mich. 3 Jac. King v. Death.

2. *Executor durante minore ætate*, or till the daughter ſhould be *married*, and then the executorſhip to ceaſe, and the daughters to be executors gets judgment on a bond made to the teſtator, after which the daughters married the plaintiffs. The daughters ſhall have this judgment as executors, for they are in *privity* and in by the teſtator, and not like an *adminiſtrator* who is in by the ordinary after the death of executor. Owen, 134. Mich. 9 Jac. C. B. Kemp and James v. Lawrence.

2 Brownl. 144. S. C. argued, ſed adjornatur.

3. *Adminiſtrator* durante minore ætate of J. S. obtained judgment, and *brought a ſcire facias againſt the bail*, who *pleaded that J. S. the executor was now of full age.* Whereupon the plaintiff demurred, and adjudged no plea, becauſe the recognizance entered into by the bail was to the adminiſtrator himſelf by name, though he had adminiſtration durante minore ætate tantum, and the infant's coming to the age of 17 years does not hinder the plaintiff from ſuing the ſcire facias againſt them. *But* per Hale, *if he had taken execution upon the principal judgment after the infant came of age*, it would have been a doubt if it ought to be ſued by

him or by the infant. 2 Lev. 37. Hill. 23 & 24 Car. 2. B. R. Enbrin v. Mompeſſon.

## * (M. 4) What the Executor at 17 may do againſt ſuch Adminiſtrator.

After the infant is at age and taken upon him the executorſhip of the will, the goods of teſtator in ſpecie in the hands of the adminiſtrator are now aſſets in the executor's hands, for he may bring trover and converſion for them. Roll, 921. pl. 15. Chandler v. Tompſon.

1. ORDINARY will not let infant executor prove the will, but grants adminiſtration to a ſtranger. Infant executor at age proves the will. He cannot have action of *account* againſt the adminiſtrator for the goods, but he may have *detinue*, or may ſue in Court Chriſtian. And. 34. pl. 86. Hill. 36 H. 8. Anon.

Noy, 86. S. C. & S. P. agreed accordingly.

2. Where an *adminiſtrator durante minore ætate waſtes the goods* of the teſtator, he cannot be charged as executor of his own wrong when the infant executor comes of the age of 17 years, becauſe at the time he had lawful power to adminiſter; but in ſuch caſe *he ſhall be charged upon the ſpecial matter;* per Doderidge and Jones. Lat. 160. Trin. 2 Car. Palmer v. Litherland.

## (M. 5) Adminiſtration De Bonis Non.

### Grantable; in what Caſes; and to whom.

1. IF *executor makes an executor and dies, his executor ſhall adminiſter the goods of the firſt teſtator;* but *contra of executor of an adminiſtrator;* for if an adminiſtrator dies and has an executor, yet his executor ſhall not adminiſter to the goods of the inteſtate, but they are in the ordinary to commit adminiſtration anew. Br. Adminiſtrator, pl. 7. cites 34 H. 6. 14.

Cro. C. 167. pl. 13. Snape v. Norgate, S. C. held accordingly by 3 juſtices, but Hyde doubted.—Roll. Abr. tit. Execution (T), pl. 3. S. C. adjudged.

2. *Judgment was had by J. S. againſt W. R. as executor*, and *before ſatisfaction the executor dies inteſtate*, and *adminiſtration of the goods of the executor, and de bonis non*, &c. *of the firſt teſtator is granted to A.* J. S. ſued a ſcire facias againſt the ſaid A. as adminiſtrator of the teſtator and executor. After verdict for the plaintiff it was moved in arreſt of judgment that the judgment againſt the executor is determined by his death without a teſtament, and that A. is not privy to the ſcire facias againſt the executor, as if one had recovered as executor and died inteſtate, no ſcire facias lies for the adminiſtrator. Three juſtices ſeemed that this is well enough, becauſe there is a *difference between a recovery againſt and by an executor*, but Hyde doubted. Judgment was given according to the firſt opinion. Jo. 214. pl. 2. Mich. 5 Car. B. R. Norgate v. Snape.

3. The *obligee made his wife executrix and died*, and afterwards *ſhe died inteſtate*, and then *adminiſtration of her eſtate was granted to T. S. who brought an action of debt on the bond, as adminiſtrator to*

*the*

*the wife*, and had judgment; but it was reverſed in error niſi, &c. becauſe *he ought firſt to have taken out adminiſtration de bonis non of the obligee*, and as ſuch to have brought the action. Sty. 225. Trin. 1650. B. R. Ley v. Anderton.

4. The *huſband died and left his widow within the age of* 17 years, and *adminiſtration durante minore ætate was granted to her father, againſt whom Y. brought an action of debt, and had judgment.* The *father died*, and the *widow being now of full age and married again, adminiſtration de bonis non, &c. was granted to huſband and wife, againſt whom* Young, who had the judgment, *brought a ſcire facias*, &c. and adjudged well brought, becauſe it is for a debt from the firſt teſtator; and a *diverſity was taken between a ſcire facias againſt an adminiſtrator of an adminiſtrator, and a ſcire facias by an adminiſtrator of an adminiſtrator*; for if adminiſtrator has judgment and dies, the ſecond adminiſtrator cannot have ſcire facias becauſe he claims paramount the firſt adminiſtrator who had the judgment, being in by the teſtator. But ſcire facias may be ſued againſt the ſecond adminiſtrator on a judgment had againſt the firſt adminiſtrator, becauſe both claim as adminiſtrator to the inteſtate, and by conſequence both are liable, and ſo no inconvenience, but this ſcire facias ought to be for the principal judgment only, and not for damages and coſts. 2 Sid. 122. Mich. 1658. B. R. Young v. Jolland. [ 108 ]

5. *Adminiſtrator obtains a judgment* and *makes an executor and* dies, the executor ſhall have a *ſcire facias* upon the judgment, and not the adminiſtrator de bonis non of the firſt inteſtate. 2 Lev. 101. Paſch. 26 Car. 2. B. R. Drew v. Baily.

6. If *feme* be *executrix and legatee*, adminiſtration de bonis non ought to be to the *huſband*; if ſhe be *not legatee, and others are*, it ought to be given to them; if there be *no legacies* to next of kin to firſt teſtator. 12 Mod. 306. Mich. 11 W. 3. Richardſon v. Seiſe.

7. *Debt on bond.* Defendant pleaded non eſt factum; whereupon iſſue was joined, and a verdict was found for the plaintiff. It was moved in arreſt of judgment that the *action will not lie for the adminiſtrator of an executor*; there muſt be an adminiſtration de bonis teſtatoris non adminiſtrat' by executor. The Court granted a rule to ſtay the entry of judgment upon the verdict till further order. Barnes's Notes in C. B. 326. Eaſt. 12 Geo. 2. Baſtard, adminiſtrator of Baſtard, who was executor of Baſtard, v. Jutſham.

## (M. 6) Adminiſtration De Bonis Non.

### What ſuch Adminiſtrator ſhall have.

1. A. makes his will and makes his wife executrix, and *deviſes the reſidue* of his goods after debts and legacies paid *to his executrix. Executrix dies before probate.* Becauſe executrix dies before election it made all the goods belong to the adminiſtrator of the firſt teſtator; per two juſtices, the other abſent. Per Henden, Ibid. 113. Denne v. Sparks, S. C. & S. P.

den, otherwiſe if there was a *legacy of a particular thing*; quære what difference. Het. 105. Trin. 9 Car. C. B. Denne v. Burrough.

Cro. C. 450. pl. 23. S. C. adjornatur, & Ibid. 457. pl. 3 S. S. adjudged.

2. If executor has *extent on a ſtat.* to teſtator, and has poſſeſſion by *liberate* and dies inteſtate, adminiſtrator of the firſt teſtator ſhall have benefit of it; per Jones J. Jo. 386. Paſch. 12 Car. B. R. in caſe of Cleve v. Vere.

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3. *Adminiſtrator by will gives inteſtate's goods*, of which he is poſſeſſed. They will not paſs; and by his grant of omnia bona & catalla ſua, a term which he has as adminiſtrator does not paſs, becauſe not ſua; Arg. Cart. 134. Trin. 18 Car. 2. C. B.

4. The entry of the decretal order is ſuſpended by adminiſtration de bonis non. 3 Ch. R. 33. 2 Dec. 21 Car. 2. Pew v. Cadmore.

Vent. 275. S. C. held that the executor ſhould have the rent and not the adminiſtrator de bonis non.—— 2 Lev. 100. S. C. held accordingly. ——Where an executor makes a leaſe rendering rent, his adminiſtrator ſhall have it, and not the adminiſtrator de bonis non. Vern. 94. in pl. 80. Mich. 1682. cites the caſe of Davie v. Drew.

5. An *adminiſtrator poſſeſſed of a term makes a leaſe for years of part of it, reſerving a rent, and makes his executor and dies;* the *executor brings debt for this rent;* the queſtion was, whether or no it would lie, becauſe the reverſionary part of the term did not come to the executor of the adminiſtrator, but did belong to the adminiſtrator de bonis non of the firſt teſtator? But *the Court did incline that it would lie upon the contract, though he could not diſtrain for it*, for the adminiſtrator de bonis non could not have it, becauſe he came in paramount the reſervation. Freem. Rep. 392, 393. pl. 507. Paſch. 1675. Drue v. Baylie.

6. A. poſſeſſed of a *term of years* died inteſtate. B. his widow took adminiſtration, but was compelled by ſentence of allocation in the ſpiritual court to pay 85l. to the relations of A.—B. the *adminiſtratrix aſſigned the term to D. in truſt for herſelf for life*, and by her will deviſed the ſame to D. and made him ſole *executor*. Decreed that D. deliver up the original leaſe, and all other deeds relating thereto, to the adminiſtrator de bonis non, that he may be enabled to proceed at law to try the title. Fin. R. 59. Hill. 25 Car. 2. Preſtidge v. Bridgman.

2 Freem. Rep. 139. pl. 176. S.C. in totidem verbis.

7. *Adminiſtrator mortgages a term of the inteſtate's, and makes A. his executor and dies.* B. takes out adminiſtration de bonis non to the firſt inteſtate, and claims the reſiduary intereſt and truſt of the term, and prays redemption. But *redemption was decreed to A. executor of the firſt adminiſtrator, who had aliened the whole eſtate in law of the term, and was not poſſeſſed in auter droit, nor of any part of the intereſt thereof but in his own right*, and ſo it ſhall go to his executor, and not to B. the adminiſtrator de bonis non. Chan. Caſes, 224. Hill. 25 Car. 2. by Ld. K. Finch. Butler v. Bernard.

S. P. adjudged in caſe of executor of an exe-

8. *Executor makes a leaſe, rendering rent;* his adminiſtrator ſhall have it, and not the adminiſtrator de bonis non; ſaid to be reſolved in the caſe of DAVIE AND DREW, ALIAS DREWRY, in B. R.

B. R. and afterwards in Canc. Vern. R. 94. Mich. 1682. in caſe of Noel v. Robinſon.

cutor, Vent. 259. Norton v. Harvey.

9. Adminiſtrator *obtains a decree by conſent* of defendant, who was his next of kin, *and before inrolment dies inteſtate.* Finch C. denied inrolment now, for the title of the adminiſtrator is gone, and belongs not to adminiſtrator of the plaintiff, but to the defendant as adminiſtrator de bonis non. 2 Chan. Caſes, 247. Hill. 30 & 31 Car. 2. Warren v. .....

10. Adminiſtrator de bonis non of the *conuſee of a ſtatute* had *agreed* with the conuſor *to aſſign* in conſideration of a ſum of money, which upon agreement the *conuſors* had *covenanted to pay him, his executors*, or adminiſtrators; adminiſtrator died. Decreed the money to be paid to the executor of the adminiſtrator, and not to the adminiſtrator de bonis non, although before the extent it could not be aſſigned at law; ſed nota that there were not debts of the firſt inteſtate appearing. 2 Vent. 362. Paſch. 35 Car. 2. in Canc. Anon.

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11. Dr. Good had *taken ſecurities in his own name in truſt for Thomas Cook*, for divers ſums of money, and *makes Good his executor*, and dies. *Thomas Cook aſſigns the ſaid money, and all bonds* taken in Good's name *in truſt for him, to Maſon*, and then *dies inteſtate. Richard Cook, adminiſtrator to Thomas, aſſigns his letters of adminiſtration to Maſon*, and then *Richard dies inteſtate.* Ann, daughter of Richard, and wife to Good the defendant, takes letters of adminiſtration of the goods of Thomas Cook, unadminiſtered by Richard her father; Maſon prefers a bill againſt Good as executor to Good the truſtee. Good the executor claims in right of his wife. Holden upon a plea and demurrer in Chancery, by Lord Keeper North, that the *intereſt of Richard well paſſed by the aſſignment of his letters of adminiſtration to Maſon*; and ſo likewiſe holden at a hearing before the Maſter of the Rolls; and ſo decreed. Skin. 232. Paſch. 1 Jac. 2. B. R. Maſon v. Good.

12. *Rent of 60l. being due to A. he died inteſtate, leaving B. his adminiſtrator. B.* and the tenant came to an account, and *the tenant pays B. 29l. and gives him a note for 31l. and then died inteſtate.* And the ſole queſtion was, whether the adminiſtrator of B. or the adminiſtrator de bonis non of A. ſhould have this rent? And it was ruled, that the adminiſtrator of B. ſhould have it; for *by taking a note for it, he had altered the property ſo as to make it due to him in his own right*, unleſs there had been any debts of the firſt inteſtate unpaid, and then this Court would have made it liable to ſatisfy thoſe debts. 2 Freem. Rep. 100. pl. 100. Mich. 1687. Anon.

Vern. 473. pl. 463. Barker v. Talcot and Shaw, S. C. held accordingly.

13. A. who is *executrix and reſiduary legatee* to J. S. and J. N. *makes B. her executor*, and deviſes to B. and C. and D. all ſuch goods as were J. S. her teſtator's, and which ſhe had not before deviſed in her will, and dies; B. *refuſed.* Decreed that adminiſtration belongs to the next of kin of the executrix, and not to the next of kin to J. S. and ſo it ſhould have been if A. had died *before probate* of J. S.'s will, and that C. and D. ſhould have whatever remained of

of the eſtate of J. S. for whoever takes adminiſtration of that are but *truſtees* for them. N. Ch. R. 172. Anon.

14. Quære if eſtate per auter vie ſhall go to *adminiſtrator de bonis non*, for it is not within the letter of the law, and in the argument of this caſe it was made a doubt. Carth. 376. Paſch. 8 W. 3. B. R. Oldham v. Pickering.

15. Executrix of obligee *marries obligor*; he may pay the money to her as executrix, becauſe if ſhe lay by the money ſo paid to her by itſelf, the adminiſtrator de bonis non of her teſtator (if ſhe dies inteſtate) ſhall have that money as well as any other goods that were her teſtator's, for if the *goods of teſtator remain in ſpecie* they ſhall go to his adminiſtrator de bonis non; but if the huſband *ſeiſes the money* it will be his, and will be a devaſtavit. 1 Salk. 306. per Holt Ch. J. Mich. 11 W. 3. C. B. in caſe of Wankford v. Wankford.

16. Where *executor recovers* in a caſe *in which he need not name himſelf executor*, and dies inteſtate, or makes an executor who will not prove the will, his executor or adminiſtrator as to the firſt teſtator's goods ſhall ſue execution, and would be liable to coſts for nonſuit of him, and not the adminiſtrator de bonis non. 6 Mod. 181. Trin. 3 Ann. B. R. Jenkins v. Plume.

17. *A promiſſory note* was made by a debtor of the teſtator *to an executor (ut executori)*, ſuch note will go to the adminiſtrator of the executor, and not to the adminiſtrator de bonis non, &c. For it is a new contract. 10 Mod. 315. Paſch. 1 Geo. 1. B. R. Betts v. Mitchell.

18. *A. lent money on bond to B. who dying inteſtate, C. took out adminiſtration to him; after which C. dying, A. took out adminiſtra-*
[ 111 ] *tion de bonis non, &c. to B.* and it was determined (inter al') that A. might, out of the aſſets of B. retain for ſuch bond-debt contracted before he took out adminiſtration; and though *A. happened to die before he had made any election in what particular effects he would have the property altered*, yet the Court ſaid it muſt be preſumed he would elect to have his own debt paid firſt; and this being preſumed, there would remain no difficulty as to altering the property; for *as the executors of A. were to account for the aſſets of B. they muſt on the account deduct to the amount of the money lent by A. to B.* 3 Wms.'s Rep 184. in a nota of the reporter's, cites Mich. 1720. at the Rolls, Weeks v. Gore.

19. If *executor dies inteſtate*, ſo much of the teſtator's perſonal eſtate as remains unadminiſtered muſt go to the teſtator's next of kin, viz. to the adminiſtrator de bonis non, and not to the adminiſtrator of the executor; per Powis J. in Chancery. 2 Wms.'s Rep. 161. Trin. 1723.

20. If a man *marries an executrix*, and *ſhe dies inteſtate*, the teſtator's perſonal eſtate muſt go to the adminiſtrator de bonis non, and not to the huſband; per Powis J. in Chancery. 2 Wms.'s Rep. 161. Trin. 1723. and ſaid it was ſo determined in the caſe of Lady Aſtry executrix of Sir Samuel Aſtry, who had married Mr. Harcourt.

21. If an *executor dies inteſtate, all the perſonal eſtate, the property whereof is not altered, ſhall go to the adminiſtrator de bonis non*, &c.

and

and not to the next of kin of the executor, this is true, becauſe from the time the executor dies inteſtate, the firſt teſtator dies inteſtate alſo, and it was the executor's own fault that he did not, as he might, alter the property; per Ld. Chancellor King. 2 Wms.'s Rep. 340. Hill. 1725. in caſe of Somner v. Hooker.

## (M. 7) What Actions ſuch Adminiſtrator De Bonis Non ſhall have. And Pleadings.

1. A. deviſes his land to be ſold by J. S. his executor; *executor ſells the land for* 40 l. *and dies inteſtate before receipt of the money*; per Gawdy, if the money be recovered it is aſſets, but he thought the adminiſtrator of the executor ſhould not have an action to recover it; Clench J. agreed, but the other juſtices would not deliver any opinion, but ſaid it was fitting to conſider of it, the queſtion being, if the adminiſtrator of the executor ſhould have an aſſumpſit for this 40 l. or had any other remedy? Cro. E. 435. pl. 49. Mich. 37 & 38 Eliz. B. R. Perkins v. Clerk and Claydon.

2. In debt on bond, the plaintiff ſaid that the executors (naming them) of G. were dead (not ſaying inteſtate), for which cauſe Baldwin moved in arreſt of judgment, becauſe if any executor made his executor, the plaintiff is not ſufficiently entitled; ſed non allocatur. But per Cur. the defendant ought to ſhew there were executors; judgment for the plaintiff. Keb. 480. Paſch. 15 Car. 2. B. R. Burgeſs v. Clayton.

3. An executor recovers *judgment by default* and dies inteſtate, an adminiſtration de bonis non is granted. The adminiſtrator de bonis non brings a ſcire facias to have execution upon this judgment, and adjudged that it did not lie; becauſe the ſtatute of 17 Car. 2. cap. 8. extends only to judgments *after verdict*, and not by nil dicit. L. P. R. 43. Mich. 34 Car. 2. B. R.

4. One acknowledges a *recognizance*, *the conuſee* makes his executor and *dies*, the *executor before an extent aſſigns the recognizance* to J. S. who pays the money to the teſtator, who ſues for this recognizance; but Ld. Keeper ſaid, it was like the caſe where the teſtator is indebted to A. and B. was indebted by bond to the teſtator, and then the executor aſſigns B.'s bond in ſatisfaction of the debt owing to A. and here the adminiſtrator de bonis non *ſhall never recover* upon this bond, no more ſhall he in the principal caſe *upon the recognizance*. Skin. 143. pl. 15. Mich. 35 Car. 2. B. R. Anon. in Chancery. [ 112 ]

5. B. was aſſignee of a *term for* 99 *years if A. live ſo long*, B. dies, living A. *reverſioner enters and dies ſeiſed* before the grant of adminiſtration de bonis non; yet when adminiſtration de bonis non is granted, ſuch adminiſtrator may have a ſpecial action of treſpaſs. 5 Mod. 384. Hill. 9 W. 3. B. R. Trevillian v. Andrew.

## (M. 8) Adminiſtration De Bonis Non. In what Caſes he may proceed in an Action begun before.

Mo. 4. pl. 15. S. C.— Adminiſtrator recovers damages de bonis aſportatis in vita teſtatoris, and dies inteſtate, his own adminiſtrator ſhall have execution; otherwiſe of debt recovered which was due to the inteſtate himſelf; but adminiſtrator de bonis non of the firſt inteſtate ſhall not have execution for want of privity; but clearly he may have a new action of debt. Mo. 680. pl. 931. Mich. 44 & 45 Eliz. B. R. Yate v. Goth. ——— Yelv. 33. Yaites v. Gough. Paſch. 1 Jac. S. C. and held that if the adminiſtrator of the firſt inteſtate brings a general action for goods of the firſt inteſtate and recovers, his adminiſtrator ſhall have execution of the judgment, becauſe non conſtat by the record whoſe goods they were; but when he has recovered, then the adminiſtration of the firſt inteſtate ſhall compel him in a court of equity to render ſo much of the money to him to the uſe of the firſt inteſtate as he had recovered before. The reporter adds, quod nota, witty diverſity. ——— S. C. cited Noy, 82. in caſe of Paſchal v. Warren. ——— Cro. C. 450. pl. 23. 457. pl. 3. Paſch. 12 Car. B. R. Cleve v. Vere, S. P. held accordingly.

1. EXECUTOR has judgment and dies, *ſcire facias* does not lie for adminiſtrator de bonis non of the firſt teſtator; for when executor is dead inteſtate, the teſtator is dead inteſtate alſo, by which judgment and recovery is void. And. 23. pl. 49. Hill. 28 H. 8. Levett v. Lewknor.

2. An *adminiſtrator made a releaſe*, and *afterwards the adminiſtration was repealed*, and declared by ſentence to be void and null. The releaſe is void. Brownl. 51. Mich. 9 Jac. Throgmorton v. Hobby.

Palm. 443. Trin. 2 Car. B. R. Paſchall v. Ware, S. C. accordingly. Lat. 140. S. C. in totidem verbis.

3. *Adminiſtrator had judgment on a bond and died inteſtate*, B. his adminiſtrator ſued a ſcire facias on that judgment, and upon two nihils returned had judgment and execution. It was moved that the adminiſtrator of an adminiſtrator could not have execution, and prayed that he ſhould not have the monies levied, &c. But the Court held that he came too late after judgment upon the ſcire facias to remedy it by motion; but he is put to his writ of error. And day was given to ſhew cauſe why the plaintiff ſhould not have his money. Noy, 81, 82. Paſchal v. Warren.

4. *Executor recovers* and *ſues execution* by elegit, and *dies inteſtate* before the debt is levied; adjudged that adminiſtrator de bonis non ſhall take advantage of this execution; becauſe it is a thing veſted; ſecus if execution had not been ſued at the time of the death of the executor. Sid. 29. pl. 1. Hill. 12 Car. 2. B. R. Harriſon v. Bowden.

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Made perpetual by ſtat. 1 Jac. 2. cap. 17. —*Before the ſtatute* 17 *Car.* 2. *cap.* 8. *the adminiſtrator de bonis non*, &c. *in all caſes ſhould commence a new action, but now if judgment be after verdict*, the *adminiſtrator de bonis non*, &c. by this act *may ſue execution upon the judgment.* 2 Saund. 149. Trin. 22 Car. 2. in caſe of Turner v. Davis.

5. 17 *Car.* 2. *cap.* 8. *ſ.* 2. *Where any judgment after a verdict ſhall be had by any executor adminiſtrator, an adminiſtrator de bonis non may ſue a ſcire facias, and take execution on ſuch judgment.*

By the Oxford act, ſtat. 30 *Car.* 2. *cap.* 2. *after a judgment obtained by an adminiſtrator, the adminiſtrator de bonis non may revive it*; and ſo where adminiſtrator de bonis non obtained *a decree* and dies, the adminiſtrator de bonis non may revive it within the equity of the ſaid ſtatute. 2 Vern. 237. pl. 220. Mich. 1691. Owen v. Curzon.

Executor has judgment by default and dies, and ſcire facias is ſued out, and goods are ſeiſed to the value, ſed remanent, &c. pro defectu emptorum. The ſheriff after goes out of his office, againſt whom the defendant in judgment brings ſcire facias for reſtitution: reſolved that ſheriff amoved may ſell, and that adminiſtrator de bonis non ſhall have the money. 6 Mod. 290. Mich. 3 Ann. B. R.

Clerk

Clerk v. Withers. ——— 1 Salk. 322. pl. 10. S. C. held that the adminiſtrator de bonis non ſhall perfect the execution thus begun, for the right now comes to him; and ſo a judgment in C. B. was affirmed. ——— 11 Mod. 24. pl. 6. S. C. and judgment affirmed.

6. If an *executor brings a ſcire facias on a judgment or a recognizance, and gets a judgment quod habeat executionem, and dies inteſtate, the* adminiſtrator de bonis non muſt bring a *ſcire facias upon the original judgment*, and cannot proceed upon the judgment in the ſcire facias. 2 Ld. Raym. Rep. 1049. Mich. 3 Ann. Treviban v. Lawrence.

7. Reſolved that ſince by 17 *Car.* 2. 13. an adminiſtrator de bonis non may *commence an execution on a judgment obtained by an executor or adminiſtrator*, it is but reaſonable, and within the equity of that act, that an adminiſtrator de bonis non ſhould be permitted to *perfect an execution thus begun*, for the right now comes to him. 1 Salk. 323. pl. 10. Mich 3 Ann. B. R. Clerk v. Withers.

Where a ſcire facias or extent is ſued out, and before inquiſition taken, the plaintiff dies, there upon the return of the extent, adminiſtrator de bonis ſhall not have a liberate. But otherwiſe if he dies after inquiſition. 11 Mod. 36. pl. 6. Mich. 3 Ann. B. R. Clerk v. Withers.

## (M. 9) Adminiſtration repealed.

### In what Caſes.

1. WHERE *a man makes an executor* and dies, and the *ordinary commits the adminiſtration to another*, and after the *executor comes and proves the teſtament*, the adminiſtration and commiſſion thereof is determined; nota inde. Br. Adminiſtrator, pl. 21. cites 9 H. 5. 5.

2. *Debt upon obligation* of 100 l. *by adminiſtrator of A. B.* The *defendant prayed oyer of the letters of adminiſtration, and that they enter it in theſe words, which would that the biſhop commit adminiſtration to L. which L. after was outlawed, and went beyond ſea, and there was in priſon ut informamur, by which the adminiſtration was committed to the plaintiff, if L. returned that he ſhall have the adminiſtration*, and per Priſot, Danby and Chock clearly, the biſhop may * revoke the adminiſtration and commit it to another; quod nota. But otherwiſe it is of an executor, for the ordinary cannot change the will or teſtament of the teſtator. And ſo ſee that *conditional adminiſtration* is good pro tempore. Br. Adminiſtrator, pl. 7. cites 34 H. 6. 14.

* S.P. Ibid. pl. 47. cites 5 E. 6.

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3. The *ordinary may commit adminiſtration and may repeal it and grant it to another*, and yet the firſt adminiſtration made by the firſt adminiſtrator ſhall ſtand in force; contrary of executors where the teſtament of the one is repealed. Br. Dette, pl. 139. cites 4 H. 7. 13.

S. P. and ſo it was put in uſe in time of H. 8. between † Brown and Shelton for the goods of Rawlins, the adminiſtration was committed to Brown and revoked, and committed to Shelton; for it is not an intereſt but a power or authority; and powers and authorities may be revoked. Br. Adminiſtrator, pl. 33. cites 4 H. 7. 14. S. C. ——— † Ibid. pl. 47. cites S. C.

At common law the ordinary might repeal an adminiſtration at pleaſure; but now ſince the ſtatute 21 H. 8. when once it is duly granted according to the ſtatute it cannot be repealed; for his power is then executed; but if it is not duly granted according to the ſtatute; as for inſtance, if granted to a wrong

wrong perſon, in ſuch caſe he may repeal it and grant it to another; for he has not executed his power. Sed nota, if the adminiſtration is repealed for want of form in the grant, in ſuch caſe the ordinary muſt regrant it to the ſame perſon though there are others in equal degree. 3 Salk. 22.

4. Note, that if *debt* be brought *againſt an adminiſtrator, and pending the writ the biſhop commits the adminiſtration to another*, this abates the firſt writ if it be pleaded; for by this the *firſt commiſſion is determined*; per Fitzh. J. clearly, quod nullus negavit; quod nota; for power or authority is revocable; contra of intereſt certain. Br. Adminiſtrator, pl. 3. cites 27 H. 8. 26.

5. *Letters of adminiſtration obtained by colluſion* are void, and ſhall not repeal a former adminiſtration; per Cur. 3 Rep. 78. b. cites D. 339. 13 Eliz.

Le. 90. pl. 115. Mich. 29 & 30 Eliz. C. B. Baxter v. Bale. S. C.

6. After *refuſal by executor* and adminiſtration committed, the executor cannot go back to prove the will; but if the adminiſtration was *committed upon executor's not coming in upon proceſs* only, in ſuch caſe the executor may come in at any time after and prove the will, and ſo undo the adminiſtration. Went. Off. Executor, 38, 39. Mich. 27 & 28 Eliz. cites Bale v. Baxter.

7. If there are *two adminiſtrations, one by the metropolitan and the other by the biſhop, where there were not bona notabilia*, the prerogative adminiſtration may be repealed; admitted. Cro. E. 283. pl. 7. Trin. 34 Eliz. B. R. Allen v. Andrews.

8. If biſhop grants adminiſtration *to one not next of kin*, he may revoke it *without any ſentence* of revocation to be given in any court ſpiritual or otherwiſe; per tot. Cur. And. 303. pl. 313. Mich. 35 & 36 Eliz. Carew's caſe.

9. If the *ordinary grants the adminiſtration of the goods of B. to A. and after* grants the adminiſtration *to R.* this *2d grant is a repeal of the 1ſt* without any further ſentence of repeal, for the adminiſtrator is but a ſervant to the ordinary, whom he may change at any time. Ow. 50. 35 & 36 Eliz. Newman v. Beaumond.

Becauſe adminiſtration was duly granted to the wife, but in the

10. Ordinary grants adminiſtration to the wife of inteſtate, he cannot revoke that; but if he grants adminiſtration to one as near of kin, and another *more near of kin* comes, he may revoke; agreed, abſente Richardſon. Hetl. 48. Mich. 2 Car. B. R. Anon.

other caſe the adminiſtration was granted unduly, for which reaſon it is revocable; for if he might do it in the former caſe this would be to make his power arbitrary, which the law abhors; but the latter is to reform an error, which all laws do allow. L. P. R. 38. cites 23 Car. 2. B. R.

If duly granted it cannot be revoked without juſt cauſe, as lunacy, &c. Lev. 157. Hill. 16 & 17 Car. 2. B. R. Price v. Parker. ——— Ibid. 186. Offley v. Beets.

11. If the *ordinary has once executed his power* according to the ſtatute, he cannot repeal the letters upon a citation. Allen, 36. Hill. 23 Car. B. R. Brown v. Wood.

[ 115 ] 12. The *teſtator made two executors* who *both died in his life-time*; then *he died leaving two ſiſters*, and the *eldeſt got adminiſtration*, the *youngeſt moved B. R. for a prohibition* to repeal it, becauſe ſhe being in equal degree, ought to have an equal ſhare of the adminiſtration; but the Court ſaid that a prohibition lies not, becauſe if the adminiſtration was not rightly granted ſhe might bring an appeal. Sty. 147. Mich. 24 Car. B. R. Brown v. Poynes.

13. The *niece* and the *nephew are in equal degree* to the inteſtate, and the ordinary may grant adminiſtration to which he pleaſes; and in the principal caſe the niece having got adminiſtration, the nephew could not get it repealed. Sty. 102. Paſch. 24 Car. B. R. Hill v. Bird. All. 56. S. C.

14. Adminiſtration was granted to the brother, and after one pretending to be the inteſtate's wife ſued to repeal it; but held that the ordinary had executed his authority and could not repeal it. Sid. 179. Hill. 15 & 16 Car. 2. B. R. Sir George Sands's caſe. Raym. 93. S. C. reſolved accordingly, and cites Cro. C. Fotherby's caſe.——3 Salk. 22. S. C. but ſtates it as an adminiſtration granted to the father, and afterwards a woman pretending to be the ſon's wife ſued to repeal it, but a prohibition wae granted.——S C. cited by Holt Ch. J. Wms.'s Rep. 44.——S. C. cited by Holt Ch. J. and held to be good law. 12 Mod. 618. Hill. 13 W. 3.

15. A *man died leaving a brother and a ſiſter married to B. who procured adminiſtration to be granted to his wife the ſiſter, pending a caveat entered by the brother;* and upon an appeal by him it was adjudged, that *where adminiſtration is granted according to the ſtatute the ordinary cannot revoke it without cauſe*, becauſe the grantee has an intereſt in the goods by the ſtatute which the ordinary cannot take from him. Lev. 186. Trin. 18 Car. 2. B. R. Offley v. Beets. Sty. 10. Paſch. 23 Car. B. R. Betſworth v. Betſworth, the Court held, that where the ordinary has granted letters of adminiſtration to one that ought to have them, they ought not to be repealed by him. If letters of adminiſtration are granted to one and after are granted to another, by this the firſt are not avoided except by judicial ſentence. Cro. E. 315. pl. 8. Pratt v. Stocke.

16. Where adminiſtration is repealed for *matter of form* in their court, it ought to be granted again to the ſame party where two are *in equali gradu*. The Court ſeemed of ſuch opinion. Sid. 293. pl. 11. Trin. 18 Car. 2. B. R. Offley v. Beſt.

17. Where adminiſtration is granted to B. becauſe of *incapacity in A. the next of kin*, on removal of ſuch impediments as *attaint, excommunication*, &c. the adminiſtration of B. ought to be repealed and granted to A. Sid. 373. Trin. 20 Car. 2. B. R. agreed by all the juſtices in the caſe of Offley v. Beſt. S. C. cited Arg. 12 Mod. 615.

18. If rightful *adminiſtrator becomes non compos*, his adminiſtration ſhall be repealed and granted to the next. Sid. 373. Trin. 20 Car. 2. B. R. agreed by all the juſtices in the caſe of Offley v. Beſt.

19. Where adminiſtration is granted *where it is not grantable*, or *inverſo ordine*, it may be repealed by the delegates, non obſtante the ſtatute, as where it was granted *partibus jure vocandis minime vocatis*. Lev. 305. Hill. 22 & 23 Car. 2. B. R. Ravenſcroft v. Ravenſcroft.

20. It is the courſe of the eccleſiaſtical court to repeal adminiſtration though granted to next of kin, in caſe of *abuſe*, Arg. Vent. 219. Trin. 24 Car. 2. B. R. in caſe of Thomas v. Butler. But Hale ſaid, that therein they exceeded their power, and a prohibition ought to go, and that they ought to take ſufficient caution at firſt to prevent male adminiſtration. Ut ſup.

21. Admini-

Allen, 56. S. C.

21. Adminiſtration cannot be revoked for the *not bringing in an inventory* and *account* by the adminiſtrator. Sty. 102. Paſch. 24 Car. Hill v. Bird.

22. *Adminiſtration being granted to one creditor, another ſues to have it repealed, and to have adminiſtration granted to him;* and the Court granted a prohibition, the ſecond adminiſtration being ready to be ſealed; but if it had paſſed the ſeal, then per Hale they would have granted a mandamus. Freem. Rep. 372. pl. 477. Trin. 1674. Anon.

Adminiſtration was granted to the younger brother. The elder

23. Adminiſtration de bonis non cum teſtamento annexo granted *to one where two had equal right* to the adminiſtration is good, and ſhall not be repealed. 2 Jo. 161. Trin. 33 Car. 2. B. R. Taylor v. Shore. Coram Delegatis.

brother ſued to repeal it. By Hale Ch. J. where it had been pending a caveat or by ſurpriſe, and ſo may be repealed in the eccleſiaſtical court, but not barely by one in equali gradu, and the Court ordered cauſe to be ſhewed againſt prohibition, though there was only a citation, which in caſes of repeal contains all, but no ſtay interim. 2 Keb. 812. pl. 13. Mich. 23 Car. 2. B. R. Ayliff v. Ayliff.

Skinn. 155. S. C. Curia adviſare vult; but inclined that a prohibition ſhould ſtand, and after further

24. Where *adminiſtration was granted durante minori ætate of the next of kin* of the inteſtate, it was inſiſted, that ſince *the ordinary* had no original power in this caſe, and this being a ſpecial kind of adminiſtration, *when he has once executed that power he ſhall not repeal it*, and the Court inclined to that opinion. 3 Mod. 23. 25. Mich. 34 Car. 2. B. R. Grandiſon (Ld.) v. Dover (Counteſs).

argument the Court was of the ſame opinion, and denied that the ordinary without cauſe could repeal an adminiſtration before the ſtatute of H. 8.

25. A. an *infant* was made *executor and reſiduary legatee, and if he died under age* then *B. another infant* was to be *reſiduary legatee, and on the ſame contingency* the reſidue was bequeathed to C. Adminiſtration during the minority of A. was granted to M. his mother. A. died inteſtate under age. B. was ſtill under age; and the queſtion was, if the adminiſtration to M. might be repealed and granted to C. who was reſiduary legatee? per Holt Ch. J. moſt certainly by this grant of adminiſtration an intereſt is granted and veſted in the adminiſtratrix. And per Holt & al', at another day, it is a point worthy of conſideration, and much may be ſaid to prove that the ordinary has executed his authority, therefore let prohibition go, and declare immediately. 12 Mod. 436. 438. Mich. 12 W. 3. Dubois v. Trant.

26. If adminiſtration be granted *to a perſon then ſolvent, compos mentis, or within communion of the church*, who after becomes inſolvent, non compos, or excommunicate, ſhall it not be repealed? 12 Mod. 437. Mich. 12 W. 3. in caſe of Dubois v. Trant, and cites 3 Keb. 124. 131. 282.

Holt Ch. J. in the caſe of Blackborough v. Davis,

27. If *feme covert dies inteſtate* leaving divers *debts due to her before coverture*, and adminiſtration is committed to her brother or other next of kin, it ſhall be repealed and granted to her huſband, and that has been ſo adjudged in the common pleas; per Holt

Ch. J. 12 Mod. 438. Mich. 12 W. 3. cites the case of Duncomb v. Mason. Wms.'s Rep. 44. cites S. C.

For that the husband had an original right as the most lawful friend of the wife by the 31 E. 3. 11. and that in the case of the husband the ordinary had no election by the 21 H. 8. 5.

28. If administration be granted *to a creditor*, and after a *more principal creditor come*, it shall not be revoked for him; and it may be here factum valet quod fieri non debuit; per Holt Ch. J. 12 Mod. 438. Mich. 12 W. 3. in case of Dubois v. Trant.

29. Where a will is of lands and goods, the Court may repeal upon an appeal; but where it is of lands only, they cannot; because there they had no authority to prove, and by consequence they had no authority to repeal. 3 Salk. 22. [ 117 ]

30. Administration *obtained by fraud and surprize*, though otherwise duly granted, may be repealed by the ordinary that granted it; a prohibition was denied. Gibb. 303. Trin. 5 Geo. 2. B. R. Harrison v. Mitchell. And per 3 J. this differs from Sir George Sand's case, because it does not appear what the circumstances of that case were. Ibid.

## (M. 10) Administration repealed. In what Cases it voids all mean Acts.

1. AFTER an administration is repealed, the authority of the administrator is determined; so that where he *obtained judgment on a bond* due to the intestate, and then the administration is repealed, *he cannot have execution*. Yelv. 83. Hill. 3 Jac. B. R. Barnhurst v. Yelverton. Brownl. 91. S. C. in totidem verbis seems only a translation of Yelv.

2. A. administrator of B. brought *debt on bond*, and before judgment that administration was revoked and granted to C. *A. notwithstanding the revocation procured judgment*, and the *second administrator released*, and the rest brought an audita querela on the release; the Court would not grant a supersedeas, because the revocation was *matter of fact only*, for it was not under the seal, and the first administrator might appeal. Brownl. 29. Beck's case.

3. On affidavit to stay execution on a judgment given for an administrator, because the letters of administration were repealed *before the judgment entered*; per Roll Ch. J. the matter comes not legally in question before us. You must bring your audita querela, let the secondary examine it. Sty. 417. Trin. 1654. Patnell v. Brook.

4. Administrator has *judgment*, and before execution the letters of administration are revoked. Defendant shall have *audita querela* to prevent execution against him. Lutw. 343. cites 2 Sand. 148. Pasch. 22 Car. 2. Turner v. Davis. So if the defendant be actually in execution; cites Yelv. 125.

Ketts's case. ——— Administration repealed is a good cause to vacate a judgment, and stop execution in crover by first administrator. 2 Saund. 146. Turner v. Davis.

If goods come to the possession of an administrator, and his administration is revoked, he shall be charged as executor de son tort. Per Keeling. Mod. 63. pl. 5. Trin. 22 Car. 2. B. R. in case of Turner v. Davis.

5. The civilians ſaid, that a *legatee that had got adminiſtration*, though it were after repealed upon a citation, ſhould yet *retain for his legacy*. Otherwiſe upon an appeal; for there the adminiſtration is avoided ab initio. Vent. 219. Trin. 24 Car. 2. B. R. in caſe of Thomas v. Butler.

6. Adminiſtrator of leſſee pays *rent to adminiſtrator of leſſor*; adminiſtration is repealed, and granted to D.—D. ſues at law as well for the rent paid to the former adminiſtrator of leſſor, as for rent ſince due, and gets a verdict and judgment againſt adminiſtrator of leſſee for the ſame. He brings a bill, and is relieved as to the rent paid, becauſe it was paid to the defendant who was then the viſible adminiſtrator. Fin. Rep. 40. Mich. 25 Car. 2. Stephens v. Langley and Caſtleton.

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7. Adminiſtration was affirmed upon *citation* to repeal it, and then the ſentence and adminiſtration are repealed upon appeal; a *leaſe* made in the mean time by firſt adminiſtrator is good, and ſhall not be avoided by the now adminiſtrator; per Hale, & tot. Cur. For it is only a repeal of the ſentence in the citation, and all one as if the firſt adminiſtration had been avoided in the ſuit upon the citation, and not as if *appeal had been originally brought upon the firſt adminiſtration*, by which it had been totally annulled. 2 Lev. 90. Mich. 25 Car. 2. B. R. Semine v. Semine.

Raym. 224. Syms v. Syms. S. C. and reſolved by Hale Ch. J. Rainsford and Wild, abſente Twiſden, that this avoidance of the ſentence ſhall not void all meſne acts done by the adminiſtrator before the action, but it is the ſame in effect with Packman's caſe. ——S. C. cited by Gould J. as adjudged. 12 Mod. 618.——3 Salk. 22. S. P. and refers to S. C.

8. Adminiſtrator poſſeſſed of a *term charged with a truſt aſſigns it* in truſt for himſelf. The adminiſtration, on a ſuit by citation (not appeal) is revoked, and now granted to the plaintiff, who ſued to have the aſſignment ſet aſide, and decreed accordingly. 2 Ch. Caſes, 129. Mich. 34 Car. 2. Jones v. Waller.

9. Adminiſtration is granted to a *creditor*, and after *repealed* at the ſuit of the next of kin. He ſhall retain againſt the rightful adminiſtrator, and his diſpoſal of the goods, even *pending the citation* till ſentence of repeal, ſtands good. Per Holt. 1 Salk. 38. pl. 6. Paſch. 13 W. 3. in caſe of Blackborough v. Davis.

10. There is a *difference* taken *when* an adminiſtration is *repealed upon a citation or upon an appeal*. 6 Rep. 18. b. Packman's case. If it is upon an appeal which ſuſpends the adminiſtration, all acts after ſuch ſuſpenſion are void; if it is repealed upon a citation, all the acts of the adminiſtrator till the repeal are good, for by the citation the grant of the adminiſtration is not ſuſpended, therefore if the adminiſtration be repealed, all acts done by an adminiſtrator, which a rightful adminiſtrator might have done, ſhall be allowed, for in them he acted in the place of the rightful adminiſtrator. But it is otherwiſe *in the caſe of an executor*, for *the probate of the will gives no authority at all to him, and therefore if he is not the rightful executor, he has no authority at all*, and it would be unreaſonable that a perſon, who has no authority, ſhould diſpoſe of the intereſt of another; the rightful executor has not only a truſt or authority to adminiſter the goods of the teſtator, but alſo an intereſt annexed

to

to the truſt; and therefore the property of all the goods after adminiſtration is completely veſted in him; and conſequently the diſpoſition of the goods of the teſtator, or releaſe of his debts, is a diſpoſition of the intereſt of the rightful executor, and therefore ſuch diſpoſition does not bind him; and ſo it was reſolved, Roll Abr. 719. [919.] which caſe was never denied that I heard of. Comyns's Rep. 151. in pl. 102. Mich. 5 Ann. C. B. Anon.

## (M. 11) Adminiſtration repealed.

### What Actions, &c. ſuch Adminiſtrator is liable to after ſuch Repeal.

1. IF adminiſtrator *waſtes the goods*, and after adminiſtration is committed to another, yet any *creditor* may charge him in debt, and if he pleads the laſt adminiſtration committed to another, the other may reply, that before the ſecond adminiſtration committed he had waſted the goods. 6 Rep. 18. b. Hill. 37 Eliz. B. R. Packman's caſe. [119]

2. The caſe was, a man died inteſtate; the ordinary committed *adminiſtration to a ſtranger*. Afterwards the *next of blood of the inteſtate ſued a citation* in the ſpiritual court to repeal the adminiſtration, and he *pendente lite ſells the goods, and afterwards the adminiſtration is repealed by ſentence*, and adminiſtration to the ſecond. It was adjudged in this caſe, that becauſe the firſt adminiſtrator hath the abſolute property of the goods in him, he might give them to whom he pleaſed; and although the adminiſtration be revoked, yet the gift is good; but if the gift be by covin it is void againſt creditors on the ſtatute of 13 Eliz. 6 Rep. 18. b. Hill. 37 Eliz. B. R. Packman's caſe.

Cro. E. 459. pl. 5. Wilſon v. Packman. S. C. held accordingly by Popham and Fenner, but Gawdy e contra; & adjornatur. ——Mo. 496. pl. 517. S. C. held accordingly.

—— S. C. cited 2 Lev. 90. —— S. C. cited Raym. 224.

3. O. againſt N. who was bound to the inteſtate in a bond, and pleads that adminiſtration of the inteſtate's goods was committed to him by the archbiſhop, the inteſtate having bona notabilia before it was committed to the plaintiff's wife. The plaintiff replies, that the adminiſtration committed to the defendant was revoked and made void. To which the defendant demurs, pretending his adminiſtration to be a *releaſe in law*, but it was otherwiſe adjudged; but if the debtor were made executor then the debt is releaſed. Judgment for the plaintiff by the Court. Brownl. 62. Trin. 6 Jac. Ok [alias Oakes] v. Needham.

4. H. adminiſtrator after much goods adminiſtered had his *adminiſtration revoked*, and the adminiſtration was *committed to B.* and *B. ſued the firſt man for goods unduly adminiſtered*, and holden no remedy but in Chancery in ſuch caſe, and by the judge lately in Chancery ſuch a decree was made by himſelf then ſitting there, but his brother Crew at the bar was not ſatisfied with the decree, or that it could be. Clayt. 25, 26. 10 Car. Harling's caſe.

Adminiſtration was repealed and granted to another, to whom the firſt adminiſtrator accounted in the Prerogative Court for the inteſtate's eſtate.

5. The defendant being ſued as adminiſtrator, *pleaded that before the day of the writ his adminiſtration was revoked and granted to another.* Per Wild, he *ought to have ſet forth that he had fully adminiſtered all the goods in his hands, or elſe that he had delivered them over to the new adminiſtrator*, for otherwiſe the debtee might be at a loſs; for thoſe goods ſhall not be aſſets in the hands of the new adminiſtrator till they come into his poſſeſſion. Freem. Rep. 13. pl. 12. Trin. 1671. C. B. Garter v. Dee.

He is thereby diſcharged from any further account. Fin. Rep. 123. Mich. 26 Car. 2. Parker v. Dee.

6. Adminiſtrator makes *attorney* to *receive the debts* due to inteſtate. He receives and pays them to the adminiſtrator. After a *will appeared*, and the letters of adminiſtration called in and *repealed by citation*. Executor may bring indebitatus aſſumpſit againſt the attorney for money received to his uſe, for the adminiſtration was merely void, and ſo attorney had no authority; coram Trevor Ch. J. at Guildhall. 1 Salk. 27. pl. 14. Mich. 2 Ann. Jacob v. Allen.

7. In an *indebitatus aſſumpſit* for money received by the defendant to the uſe of the plaintiff as adminiſtrator of J. S. on non aſſumpſit pleaded, upon evidence the caſe appeared to be, that J. S. died inteſtate poſſeſſed of certain Iriſh debentures, and the defendant pretending to a right to be *adminiſtrator* got adminiſtration granted to him, and by that means *got thoſe debentures into his hands, and diſpoſed of them.* Then the defendant's *adminiſtration was repealed and adminiſtration granted to the plaintiff, and he brought this action for the money he ſold the debentures for.* Afterwards the laſt day of the term, upon motion to the Court, they gave judgment for the plaintiff. And Holt ſaid, that he could not ſee how it differed from an indebitatus aſſumpſit for the profits of an office by a rightful officer againſt a wrongful, as money had and received by the wrongful officer to the uſe of the rightful. 2 Ld. Raym. Rep. 1216, 1217. Mich. 4 Ann. in the caſe of Lamine v. Dorrel.

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## (M. 12) Second (or after) Adminiſtrator. His Power as to the Goods of the firſt Teſtator.

1. IF the ordinary commits the adminiſtration to J. S. he may *refuſe* adminiſtration, and then the ordinary may commit it to another, for he cannot compel him to adminiſter, and there the firſt to whom it was committed ſhall not be charged; and *in debt againſt the firſt* adminiſtrator *he may ſay that ne unques adminiſter*; quod nota. Br. Adminiſtration, pl. 7. cites 34 H. 6. 14.

2. *An adminiſtration is granted and afterwards another*, and this *ſecond adminiſtrator releaſes*, &c. *an action brought by the firſt adminiſtrator*; and judgment being had, and the defendant in execution, he ſhall not be relieved in an audita querela, for this adminiſtration

niſtration was void. Dyer, 339. a. b. pl. 46. Hill. 17 Eliz. Anon.

3. *Adminiſtration was granted by the biſhop of Briſtol, when in truth the inteſtate had bona notabilia*, and afterwards the *Prerogative Court granted adminiſtration to another, who brought treſpaſs againſt the firſt adminiſtrator for taking the goods;* Gawdy and Jeofreys ſaid, that it would be hard to make him a treſpaſſor, becauſe the granting adminiſtration does belong to the ordinary mero jure, and it is probable that neither he nor the party did know that the inteſtate had bona notabilia; but on exception to the bar, becauſe it was there *pleaded that the defendant had paid 20 l. to A. to whom the inteſtate was indebted by bond, and did not ſhew how the bond was diſcharged, as by releaſe, acquittance, cancelling* the bond, &c. by which the plaintiff may be diſcharged, the plaintiff had judgment to recover. 2 Le. 155. pl. 188. 19 Eliz. B. R. Dunne's caſe.

4. Debt is brought by a *woman adminiſtratrix.* She *has judgment. Before execution this adminiſtration is revoked by covin, and committed to the ſaid woman and her ſon.* The *ſon releaſes the debt.* The *woman ſues execution.* The *debtor brings an audita querela.* It does *not lie becauſe of the covin.* Jenk. 285. in pl. 17.

5. A *bill* brought *by an adminiſtrator durante minoritate, and an account decreed to be taken.* The *infant marries, and thereupon the adminiſtration, during her minority, is committed to the huſband.* Upon a new bill brought to have the benefit of the former proceedings, the defendant demurred, and the *queſtion was, whether this ſecond adminiſtrator could carry on the account?* It was objected, that ſuch an adminiſtrator cannot at law take execution on a judgment obtained by the former adminiſtrator; but it was *ordered that the defendant ſhould anſwer, and that matter be ſaved unto him at the hearing* of the cauſe. Vern. 25. Mich. 1681. Coke v. Hodges.

## (N) What Perſon may make Executors. [ 121 ]

[1. *ROT. Pat.* 12 *E.* 1. *M.* 22. *Conceſſio* Epiſcopo Bangor *quod licet Epiſcopi Wallenſes ex antiqua conſuetudine teſtamentum aliquod condere non poſſint temporibus retroactis idem tamen epiſcopus nunc poſſit, &c. Rot. Pat.* 18 *E.* 1. *N.* 6. *Licentia abbati* Sancti Edmundi, *quod condere poſſit teſtamentum & executores ſui plenam habeant adminiſtrationem de bonis ſuis.*]

[2. The *queen, wife of the king*, may make executors. 24 E. 1. Rot. Clauſ. M. 11. Executors were made and admitted good.]

[3. A *feme covert executrix* may make an executor of the goods which ſhe has as executrix. M. 8 Jac. B. GRANT'S CASE, per Cur. * without the aſſent of the baron.]

* Contra per Holt Ch. J. 12 Mod. 306. in caſe of Richardſon v. Seiſe.

If a woman have a leaſe, an eſtate by extent, a wardſhip, the next avoidance of a church, or other chattel real, theſe are not deveſted out of her into her huſband by marriage, but in caſe ſhe overlive him, they continue to her as before, no alienation or alteration having been made by the huſband, who had power to diſpoſe of them by gift in his life-time, though not by his will; yet ſuch a woman in her huſband's life-time could not, of or for theſe things, without her huſband's aſſent, make an executor or will; but ſhe dying before him, they would, by the operation of law, accrue to him. Another ſort or kind of goods, or rather intereſts, a woman may have, viz. debts, or things in action, which, as the former, are not deveſted out of her by marriage into her huſband, nor yet can ſhe thereof make an executor without her huſband's aſſent, although they be one degree farther from the huſband than the ſaid chattels real; for that though the huſband do over-live the wife, he ſhall not be intitled to them as to the former. But if his wife make him executor, as ſhe may, or if after her death he takes adminiſtration of her goods, then as he is thereby intitled to them, ſo he is liable alſo to pay her debts out of the ſame, when he ſhall have received them. Went. Off. Ex. 196, 197.

[4. A *feme covert* may make an executor *of things in action* due to her; per Cur. M. 8 Ja. B. GRANT'S CASE.]

* Jo. 175. Hill. 3 Car. B. R. the S. C. cited and S. P. held accordingly by three juſtices; but two doctors of the civil law were of a contrary opinion. —— And ſo was Crooke J. Cro. Car. 106. in S. C. —— See Went. Off. Ex. 199, &c.

[5. A *feme covert* cannot make an executor *without the aſſent of her baron*; for * the adminiſtration of her goods of right belongs to the baron; per Cur. 4 Rep. 51. b. OGNELL'S CASE.]

So of a guardian of an hoſpital who has confreres in reſpect of any thing which belongs to the corporation. Br. Arrearages, pl. 6. cites 19 H. 9. 44. [but it ſhould be 19 H. 6. 44. according to Br. Corporations, pl. 26. S. C.]

6. Brook ſays, it ſeems that an *abbot* cannot make executors; for he has no capacity but to the uſe of the houſe. Br. Abbe, pl. 7. cites 7 H. 6. 27.

7. The biſhops, lords, and commons, aſſented in full parliament, that *the king, his heirs, and ſucceſſors*, might lawfully make their teſtaments, and that execution ſhall be done of the ſame, whereof ſome doubt was made before. 4 Inſt. 335. cites Rot. Par. 1 H. 5. Nu. 13. The teſtament of king H. 4. and his executors refuſed; the archbiſhop of Canterbury was to grant adminiſtration, with the teſtament annexed to the ſame. See 1 H. 6. Nu. 18. the laſt will and executors of H. 5. 10 H. 6. Nu. 27.

[ 122 ] 8. An *ideot* cannot. See Went. Off. Ex. 14. cites 3 Eliz. D. 203, 204.

9. A *lunatick* in his *lucid intervals* may make a will and executors, but not otherwiſe. Went. Off. Ex. 15.

10. If one *by age or ſickneſs* becomes of *non ſanæ memoriæ*, he is unable to diſpoſe of lands or goods. Went. Off. Ex. 15.

11. One *deaf and dumb born* may make a grant, ſaith Mr. Perk. if he hath underſtanding, which is hard, as he confeſſeth, conſequently much more a will; but in the time of K. H. 1. it is left a demurrer, whether a deed by ſuch be good or not. Went. Off. Ex. 15.

12. If but *mute*, he may wage his law, attorn by ſigns, and ſo perhaps *by ſigns* declare his will. Went. Off. Ex. 15. cites 44 Aſſ. p. 36.

13. An *alien* may make or be an executor, ſo as he be *not* an alien *enemy*, for ſuch cannot ſue, as in the late queen's time was held. But there the doubt was, whether a ſubject of Spain were at that time

time to be held an enemy, *no war being proclaimed* between the kingdoms, *though hoſtility exerciſed?* Went. Off. Ex. 15.

14. Whether an *excommunicated* perſon be able to make a will or not, may be ſome doubt, ſince Keble denies him ability to preſent to a church; and in this very point antiently the opinion of canoniſts hath been negative, but more lately grew affirmative. Went. Off. Ex. 16.

As to feme coverts making wills and executors, ſee tit. Baron and Feme (R. a).

## (O) What Perſons for a collateral Reſpect may make Executors.

Fol. 912.

[1. A Man *attaint of felony* cannot make executors, ſo no adminiſtration ſhall be granted of ſuch man. D. 14 El. 309. 76.]

[2. If an *exigent of felony* be awarded againſt a man, though by this he loſes all his goods, yet he may make executors *to reverſe it*. 5 Rep. 111. Marsh's case. (For there he is not attainted.)]

Cro.E. 225. pl. 10. Paſch. 37 Eliz. B. R. the S. C. ſed adjornatur. ——Ibid. 273. pl. 2. Paſch. 34 Eliz. S. C. but no reſolution as to this point. But in a nota at the end of the caſe ſays, that this caſe is cited 5 Rep. 111. to be reſolved that writ of error was well brought by the executor, and that it was reverſed at his ſuit. —— Le. 323. pl. 309. S. C. and the outlawry was reverſed accordingly. —— Ow. 147. S. C. —— Godb. 380. in pl. 365. Paſch. 3 Car. B. R. Jones J. ſaid that Marſh's caſe, 5 Rep. 111. was never adjudged; and that there an executor could not reverſe an attainder by outlawry, becauſe it doth reſtore the blood. —— A perſon outlawed may make an executor, and this executor may have a writ of error to reverſe the outlawry; admitted. Hutt. 54. Mich. 20 Jac.

[3. So adminiſtration ſhall be granted *of ſuch man*. 5 Rep. 111.]

[4. A man *outlawed in a perſonal action* may make executors, for he may have debts upon contracts which are not forfeited to the king. M. 43 & 44 El. B. R.]

Cro.E. 850. pl. 6. Shaw v. Cutteresſ, S.C. & S.P. reſolved that a man may be adminiſtrator to ſuch perſon outlawed, as to goods taken for treſpaſs before outlawry; he may have treſpaſs, and recover the value of the goods which ſhall be aſſets in his hands.

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[5. So adminiſtration may be granted *of ſuch a man* for the cauſe aforeſaid; per Cur. M. 43 & 44 El. B. R. Shaw against Cutteris.]

Cro.E. 850. pl. 6. S.C. adjudged.

6. One *attaint of treaſon* cannot make executor. 2 Le. 5. pl. 7. 16 Eliz. C. B. Cranmer's caſe.

Though a perſon attaint cannot make an executor, yet the perſon nominated as ſuch by a perſon attainted may have a writ of error to reverſe the attainder which diſables him to be executor, and then he is executor. Per Gawdy J. Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R. in Marſh's caſe.

7. *Perſons attainted, convicted or outlawed*, it will be ſaid, that theſe can have no goods of their own, and conſequently they can make no wills nor executors; and it is not to be denied, that we find it pleaded ſometimes by executors that their teſtators ſtood

outlawed But firſt it is clear, that all and every of theſe *may have goods as executors to others*, which neither are forfeited by attainder or outlawry, nor deveſted by marriage or villeinage. *Therefore as touching them they may make teſtaments.* And that all theſe ſorts of perſons may be executors is alſo evident. So alſo touching villeins, monks and friars, who can have no goods to their own uſes. And that one attainted of felony may have an executor, appears by the caſe in the late queen's time, wherein it was long debated, whether ſuch an executor might maintain a writ of error, or not, to reverſe the attainder of the teſtator? And as for other outlawries, the plea thereof by the executors that their teſtator was, and died outlawed, proves not a nullity of the will or executorſhip; for then they might have pleaded, that they were never executors; but it tends to this, that no goods did or could come to them for ſatisfaction of the debts, by reaſon of outlawry; yet it has been delivered, not of old only in many books, but by ſome of late, that debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for treſpaſs in battery or falſe impriſonment, &c. Went. Off. Ex. 15, 16.

In what caſes executors or adminiſtrators ſhall have execution, ſee Execution (P).

## (P) What Actions the Executors may have for Act in Life of Teſtator.

Br. Executor, pl. 122. S. P. and cites S. C. and ſays that this ſeems to be by the equity of the ſtatute de bonis aſportatis, &c. ——— S. C. cited Poph. 191. Mich. 2 Car. B. R.

[1. EXECUTOR may have a *raviſhment of ward* for raviſhment in life of teſtator. 7 H. 4. 2. b.]

*Poph. 189. Mich. 2 Car. B. R. the S. C. and all agreed, that if it were on an eſcape after judgment the action would lie by the executors, according to the caſe of F. N. B. 121. (A), but the principal caſe was adjourned.—Lat. † 167. Maſon v. Dixon, S. C. the Court was divided; & adjornatur. ——— Jo. 173. pl. 8. S. C. but no judgment. ——— Noy, 87. S. C. and the Court divided, but ſays that this difference was put and agreed, that the executor ſhall have the action where the thing itſelf is to be recovered, but not where damages only are to be recovered. ——— 1 Salk. 12. pl. 2. ſame caſes cited per Cur. in caſe of Williams v. Crey, and ſaid that there is a great difference between meſne proceſs as the caſe was in thoſe books, and proceſs in execution; for by levying the goods a right was veſted in the teſtator. ——— S. C. cited Comb. 322. ——— Same diverſity taken by Holt Ch. J. 12 Mod. 71, 72. in S. C. who ſaid that on eſcape in mean proceſs there is only the loſs of the proceſs.

[2. If A. be taken upon a proceſs in an action of debt at the ſuit of B. and is in the cuſtody of the gaoler for want of bail, and *eſcapes*, and after B. dies, in this caſe the executor may have an *action on the caſe* upon this eſcape; for though this action is to have but damages for the eſcape, and though he was impriſoned but upon mean proceſs, yet inaſmuch as the ſuit was for debt this ſhall be of the ſame nature, and therefore within the *equity of the ſtatute of* 4 *E.* 3. dubitatur. Mich. 9 Car. B. R. STARTIN AGAINST FARMER AND LOWTON, bailiffs of Bridgeworth. Intratur Tr. 9 Rot. 1390. between * LEMASON AND DIXON dubitatur.]

† [ 124 ]

[3. If

[3. If upon a *fieri facias the ſheriff levies the debt, and does not return his writ nor pay the money* to the party, and after the party at whoſe ſuit the execution was awarded dies, the executor may have action upon the caſe upon this matter. B. R. * SPURSTOW AGAINST PRINCE. This moved in arreſt of judgment after verdict for the plaintiff, and upon this the plaintiff prayed judgment againſt himſelf, becauſe that he would commence a new action for his expedition. For it was objected, that as to the *not returning the writ* it *was a perſonal wrong*.] Fol. 913.

* Cro. C. 297. pl. 6. Hill. 8 Jac. S. C. and that ſuch action is not maintainable by

the equity of the ſtatute of 4 E. 3. de bonis teſtatoris aſportatis was cited a caſe 3 Car. in this court betwixt LEBASTON AND DISKINS, (which Jones J. ſaid he well remembered), where an action upon the caſe was brought by an executor againſt a ſheriff for ſuffering an eſcape upon mean proceſs, in the time and at the ſuit of the teſtator, and becauſe it was a perſonal wrong to the teſtator the action lay not for the executor; but no judgment was given there, for the Court was divided therein; ſo here, &c. whereupon the Court would adviſe until the next term.

4. 13 *E.* 1. *cap.* 23. Enacts, that † *executors ſhall have a writ of account*, By the common law executors

ſhould not have an action of account for an account to be made to the teſtator, becauſe the account reſted in privity, for remedy whereof this act was made; but per legem mercatoriam, an action of account did lie for executors. The ſucceſſor of a prior, or the like, ſhould have an action of account for an account to be made to the predeceſſor, becauſe the houſe never dies. 2 Inſt. 404.

† Adminiſtrators had no action until the ſtatute of 31 Ed. 3.

No action of account was given to the executors of executors till the ſtatute of 25 E. 3. But this act of 25 E. 3. as to the action of debt, covenant, &c. therein mentioned, is but an affirmance of the common law. 2 Inſt. 404.

*And like action and proceſs by that writ as the deceaſed had or might have, if he were living.* The heir in ſocage dies before

the age of 14; his executors or adminiſtrators ſhall have an action of account preſently, and yet the heir himſelf ſhould not have an action before 14, but the ſtatute ſays, eandem actionem, and not ad idem tempus. 2 Inſt. 404.

5. 4 *E.* 3. 7. *Gives action to executors for treſpaſs done to their teſtators, as for his goods and chattels carried away* in his life, *and ſhall recover their damage in like manner as he, whoſe executors they are, ſhould have done if he had lived.* A tort to the perſonal eſtate is within this act, but to the perſon

or to the inheritance (as waſte) is not. Nota. See Lat. 169. at the end of the caſe of Maſon v. Dixon.

This ſtatute extends by equity to adminiſtrators; per Brooke Ch: J. Pl. C. 178. b.——Pl. C. 467. a. S. P.

6. *Attaint* was brought *by a feme inaſmuch as her baron loſt in quare impedit*, and awarded good, and that the *executor of the baron ſhall not have it* notwithſtanding that it was alleged that the damages were executory of the goods of the baron; quod nota. Br. Executor, pl. 35. cites 46 E. 3. 23.

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7. *Ejectment* was brought *by executors of the ouſting their teſtator out of his farm for years*, by the equity of the ſtatute de bonis aſportatis in the life of teſtator to have treſpaſs; and per Tild. it lies well. Br. Executor, pl. 45. cites 7 H. 4. 6. S. P. And. 242, 243. and the Court held the ſame for law.—

Ejectment of ward lies for executors by the equity of the ſtatute 4 E. 3. cap. 7. Arg. Keilw. 101. b. pl. 2. ——Ejectione firmæ lies for the executor where the ejectment was made to teſtator of the ſame thing as is to be recovered; but this is by the equity of the ſtatute of 4 E. 3. cap. 7. But at common law it did lie for him, unleſs where he was to recover the thing itſelf; but he might have had covenant or quare ejecit infra terminum. Lat. 168. per Jones J. Trin. 2 Car——S. P. Cro. E. 377. Arg. ſaid to have been ſo taken.

8. Note

* S. P. but cannot have treſpaſs of charters taken in the life of teſtator; for charters do not appertain to them. Br. Executor, pl. 138. cites 10 E. 4. 9.

8. Note by the ſtatute executor ſhall have * *treſpaſs de bonis aſportatis* in the life of teſtator, but he ſhall *not* have treſpaſs *de clauſo fracto in the time of teſtator*; for that action dies with his perſon. Br. Executor, pl. 120. cites 11 H. 4. 3.

9. *Executors brought writ of error of an outlawry pronounced againſt the teſtator in his life*, and for divers errors this was reverſed at their ſuit, and they reſtored to the goods of their teſtator ſeiſed by this means. Br. Executor, pl. 55. cites 11 H. 4. 65.

Br. Proceſs, pl. 41. cites S. C.

10. If *ne unques ſon bailie* be found againſt the defendant, by which the *plaintiff has judgment*, and *dies before account*, the executors ſhall have *ſcire facias ad computandum*, & capias & exigent. Br. Scire Facias, pl. 81. cites 14 H. 4. 1.

11. If the *conuſee upon a ſtatute merchant or ſtatute ſtaple dies*, his executors or adminiſtrators ſhall have ſcire facias, and if he be not true executor, or if the teſtator be alive, there the conuſor ſhall have audita querela or ſcire facias againſt him for the diſceit. Br. Scire Facias, pl. 235. cites 2 R. 3. 8.

12. 33 *H. 6. cap.* 1. *Upon full information to the Ld. Chancellor, by the executors of the taking teſtator's goods by his houſehold ſervants, a proclamation may be iſſued, requiring ſuch ſervants to ſurrender themſelves, on pain of being adjudged felons, and if they appear, they ſhall be committed until they anſwer or give ſecurity to appear from time to time.*

So if it was upon meſne proceſs in teſtator's life time. Vent. 37. Obiter.— Per Cur. an executor cannot have an action for an eſcape upon meſne proceſs, becauſe that is merely perſonal; but he may for an eſcape upon a capias ad ſatisfaciendum, and this by the equity of the ſtatute of 4 E. 3. 3 Salk. 149. pl. 2. Paſch. 7 W. 3. B. R. in caſe of Williams v. Cray.

13. If *a man has another in execution for debt*, and the *gaoler ſuffers him to eſcape*, and after the *recoveror dies, his executors ſhall have debt upon this eſcape*; per Anderſon, Manwood, and Windham; but Coke ſaid, they ſhall not have an action upon the caſe at common law. Goldſb. 90. in pl. 19. Paſch. 30 Eliz. Anon.

S. P. and it was agreed per Cur. that a ſpecial writ lies for the executor in not ſuffering them to preſent to the archdeaconry of D. againſt the biſhop who granted it, which became void in the time of the teſtator and belonged to him, and after his death belonged to the plaintiffs as executors to preſent. Cro. E. 141. pl. 4. Trin. 31 Eliz. C. B. and 207. pl. 1. Mich. 32 & 33 Eliz. C. B. Smalwood v. the Biſhop of Coventry & al'.——And. 241. pl. 257. Sale v. the Biſhop of Coventry & al. S. C. ——Le. 205. pl. 284. S. C. and agreed that the executors might have their ſpecial writ upon their caſe for the ſaid diſturbance.——Sav. 118. pl. 188. S. C. and held by all but Walmſly, that quare impedit lies for executor on a diſturbance made to teſtator.——4 Le. 15. pl. 53. S. C. held accordingly by the equity of the ſtatute 4 E. 3. cap. 7. and that the clerk ſhould be removed at the ſuit of the executors.——Ow. 99. Sale v. the Biſhop of Litchfield, S. C. by three juſtices contra Walmſley.——S. C. cited Noy, 87.——S. P. Arg. Cro. E. 377.——A quare impedit lies for the executor by the equity of this ſtatute where a ſtranger preſented wrongfully in life of the patron. Went. Off. Executor, 66. ſays it was ſo reſolved in queen Eliz. time.—A quare impedit lies for an † executor upon the ſtatute 4 E. 3. cap. 7. in caſe he brings it within ſix months after the avoidance; per Holt Ch. J. 6 Mod. 126. Hill. 2 Ann. B. R.

14. *Quare impedit* lies of diſturbance to teſtator; per Doderidge J. Lat. 168. Trin. 2 Car.

† [ 126 ]

Ow. 99. Sale v. the Biſhop of

15. A. *ſeiſed of an advowſon in fee*; the *church voided*, and the *biſhop collated wrongfully*. *A. died.* It was held that a *quare impedit*

*pedit lay for his executors* upon that diſturbance, and that *by the equity of the ſtatute of* 4 *E.* 3. *cap.* 7. which gave an action of treſpaſs to executors of goods carried away in the life of the teſtator, and held that the clerk ſhould be removed at the ſuit of the executors. 4 Le. 15. pl. 53. Mich. 32 Eliz. C. B. The Biſhop of Coventry and Litchfield's caſe.

Litchfield, S.C. Walmſley conceived that no action would lie, becauſe the ſtatute gives an action for the taking of goods and ſuch like things, but here is no taking but only a diſturbance, which may be done by parol. But the other three juſtices contra; for the ſtatute ſays that they ſhall have an action of treſpaſs for a treſpaſs done to their teſtator, and not for taking of goods, ſo that the taking goods is only by way of reſemblance, and not that they ſhall have action of treſpaſs for taking of goods only. ——And. 241. pl. 257. S. C. held accordingly.

16. An executor ſhall have an action upon the *caſe de bonis teſtatoris caſually come to the hands and poſſeſſion of another, and by him converted to his own uſe in the life of the teſtator*, and that by the equity of the ſtatute of 4 E. 3. 7. de bonis aſportatis in vita teſtatoris. Held by all the juſtices of C. B. and barons of the Exchequer. Le. 164. pl. 278. Mich. 31 & 32 Eliz. in caſe of Ruſſel v. Pratt.

S. C. cited as adjudged in Cam. Scacc. And. 243.

17. Not by the common law, becauſe he does not recover the thing itſelf, but by the equity of the ſtatute 4 *E.* 3. 7. he ſhall have *ejectment*, *raviſhment of ward*, and *quare impedit*; per Doderidge J. Lat. 168. cites 32 & 33 Eliz. C. B. Biſhop of Litchfield's caſe.

18. It was adjudged by all the juſtices, that executors may have *trover and converſion* upon a trover and converſion in the time of the teſtator, by the equity of the ſtatute of 4 E. 3. Cro. E. 377. pl. 28. Hill. 37 Eliz. C. B. The Counteſs of Rutland's caſe.

Mo. 266. pl. 416. S. C.—— Ow. 156. The earl of Rutland's caſe S. C. ſays the great doubt did ariſe becauſe the day and time of the converſion was not ſhewed, for perhaps it was after the writ and before the declaration, and alſo if it was in vita teſtatoris they ſhould have this action by the 4 Ed. 3. But at length Walmſley ſaid, that all the juſtices of the Common Pleas, and of Serjeant's Inn in Fleet-ſtreet, (beſides Peryam Ch. B.) were of opinion that judgment ſhould be given for the plaintiffs, for that ſome of them held, that the day of the converſion is material to be ſhewn, and others that of neceſſity, as this caſe is, it ſhall be intended that the converſion was in the plaintiff's time, wherefore judgment was entered for the plaintiffs, but a writ of error was brought and the caſe much debated.

19. *Treſpaſs* by an adminiſtrator *de bonis aſportatis in vita inteſtati.* After verdict was moved in arreſt of judgment that this action is not given by the ſtatute of 4 Ed. 3. [cap. 7.] but ruled without argument that the action lay by the equity of the ſtat. for it is in equal miſchief, and cites 14 H. 7. 13. accordingly Cro. E. 384. pl. 7. Paſch. 37 Eliz. Smith v. Colgay.

Mo. 400. pl. 526. Paſch. 37 Eliz. Harris v. Vandcogie, S. P. held accordingly.

20. Executor might maintain a *writ of error* to reverſe an *attainder* againſt his teſtator, to the intent to be reſtored to teſtator's goods, though by his attainder he had loſt his land which was the principal. Cited per Fenner J. Cro. E. 558. Paſch. 39 Eliz. B. R. to have been adjudged per three J. againſt one, in Nicholſon's caſe.

21. Executor may charge perſons for any *debt or duty due to the teſtator*, as the teſtator himſelf might have done, and the ſame actions that the teſtator himſelf might have had, the ſame, for the moſt part, may executors have alſo. Swinb. 366. 5 edition.

22. Whether *treſpaſs* lies for an executor againſt one *for ſpoiling teſtator's corn, graſs, or wood growing*, hath been queſtioned, but not reſolved as he knows of. But he thinks it may lie with this difference: * 1ſt, Becauſe the ſtatute 4 *E.* 3. *ſpeaks not only of goods carried away*, as limiting the law to that treſpaſs only, *but ſpeaks generally of treſpaſs done to teſtators*, and then brings in the particular of goods as one inſtance. And further the ſtatute *ſpeaks of treſpaſſes remaining unpuniſhed*; but it would leave many unpuniſhed if it extended only to that ſingle treſpaſs of goods taken away, viz. moveables; alſo the teſtator was intitled to recover damages for this treſpaſs, which, if removed, his executor would have, and even the things themſelves, if felled in teſtator's life, would all have come to executor, as part would, though not felled; and for that reaſon all the *damages recoverable in lieu* thereof, out of which, if recovered, the debts and legacies of the teſtator are to be ſatisfied. Beſides, this action is ſevered from the ſtate of the land. See Went. Off. Executor, 67.

23. *And* he takes a *difference* between ſpoiling *corn which goes* to the executor after teſtator's death, though it was land of inheritance, and the corn not ſevered, and ſpoiling *wood or graſs* not ſevered, which goes to the heir; and ſo the action lies for executor as to the corn, and for the heir as to the wood and graſs. Went. Off. Executor, 68.

24. *Replevin* lies for taking in life of teſtator. Lat. 167. Arg. cites Fitzh. Executor, 106.

25. An adminiſtrator may have an action of *debt againſt a ſheriff upon an eſcape* ſuffered *of a priſoner of the inteſtate in his life-time*; per Roll Ch. J. and judgment niſi. Sty. 32. Trin. 23 Car. Bowmer v. Payte.

26. M. brought *debt againſt an executor upon* 2 *E.* 6. *for not ſetting forth of tithes due to the teſtator.* Upon non debet pleaded, and a verdict for him, it was moved in arreſt of judgment, that this being a forfeiture given by the ſtatute for a tort done to the teſtator, it could not be brought by the executor. The Court were clear of opinion for the plaintiff, and ſaid it had been formerly reſolved ſo in the Exchequer chamber. Vent. 30, 31. Paſch. 21 Car. 2. B. R. Morton's caſe.

2 Keb. 874. pl. 37. Emerſon v. Anniſon, S. C. & S. P. agreed per Curiam. — 3 Salk. 160. pl. 3, 4. S. C. accordingly. — Freem. Rep. 22, 23. pl. 29. Emerſon v. Amell, S. C. & S. P. held accordingly.

27. Error of a judgment in C. B. in *treſpaſs* brought by the plaintiff as executor, upon the ſtatute 4 Ed. 3. *de bonis aſportatis in vita teſtatoris.* The plaintiff *declared that the defendant blada creſcentia upon the freehold of the teſtator meſſuit defalcavit cepit & aſportavit.* Upon not guilty pleaded the plaintiff had a verdict, and it was inſiſted for the defendant that no action lay for cutting the corn, for while it ſtands it is parcel of the freehold; but all the Court held that this was but one entire treſpaſs, and the declaration deſcribes only the manner of carrying the corn away; if it had been quare clauſum fregit & blada aſportavit, it had been naught, or if he had cut the corn and let it lie, no action would lie; ſo if the graſs of the teſtator be cut and carried away at the ſame time, becauſe the graſs is part of the freehold; but corn growing is a chattel. Vent. 187. Hill. 23 & 24 Car. 2. B. R. Emmerſon v. Emmerſon.

28. Debt

28. Debt by an executor *for an eſcape* ought to be *in the detinet only;* and if in the debet and detinet, though the judgment were obtained by him, it is ill. 1 Lutw. 893. Trin. 2 Jac. 2. in Cam. Scacc. Glover v. Kendall.

29. If *one taken upon a ca. ſa.* be *voluntarily ſuffered to eſcape,* yet a *ſcire facias* upon the judgment *by an adminiſtrator lies* againſt him. 2 Lutw. 1264. Paſch. 2 Jac. 2. Sudall v. Sudall.

30. The defendant was tenant of *cuſtomary lands held of the manor of A.* of which manor B. was lord; that *a fine was due to him for an admiſſion;* that *upon the death of the ſaid lord, the manor deſcended * to W. as his ſon and heir, who died,* and the plaintiff as *executor to the heir brought an indebitatus aſſumpſit for this fine.* By the opinion of J. Dolben, Eyre, and Gregory, judgment was given for the plaintiff. 3 Mod. 293. Mich. 4 Jac. 2. B. R. Shuttleworth v. Garnet.

3 Lev. 261. S. C. adjudged by the three juſtices accordingly, contra Holt Ch. J.—Comb. 151. Shuttleworth v. Garret,

ſtates it for a cuſtomary fine due on the death of the lord; and adjudged that an indebitatus aſſumpſit lies; per three juſtices, but Holt Ch. J. e contra.———Carth. 90. S. C. adjudged by three juſtices, contra to the opinion of Holt Ch. J.——— Show. 35. S. C. & S. P. adjudged accordingly.——— 3 Lev. 262. at the end of the caſe ſays that another judgment was given in another cauſe at the ſame time for the ſame executors for another copyhold fine; [which ſeems to be the ſame as ſtated in 3 Mod. 233.]

*[ 128 ]

31. *Executor of a biſhop* may have action of *covenant againſt* the executor of an aſſignee of a *leſſee of a former biſhop,* for a covenant broke in the time of the teſtator biſhop. 2 Vent. 56. Trin. 1 W. & M. in C. B. Morley v. Polhill.

32. Caſe by an executor for a *falſe return of a fieri facias* in the life-time of the teſtator is within the 5 E. 3. though it was objected this was a perſonal tort; for per Cur. this differs from meſne proceſs, as 1 Jon. 173. Noy, 87. Lat. 167. Poph. 187. for by levying of goods a right was veſted in the teſtator, the return was that he had levied part only, ubi revera he had levied the whole debt. 1 Salk. 12. pl. 2. Paſch. 7 W. 3. B. R. Williams v. Crey.

Cumb. 322. Williams v. Cary. S. C. ſtates it to be for under valuing the goods taken, and judgment for the

plaintiff, niſi. The reporter adds a nota, that it muſt be intended that it was proved to the jury that the ſheriff acted corruptly, and then might have had more money for the goods, or elſe it ſeems that the action lis not.———4 Mod. 403. S. C. ſtated accordingly, and adjudged for the plaintiff, niſi.——— 12 Mod. 71. S. C. adjudged that the action well lay for the executor being within the equity of the ſtatute.——— 3 Salk. 149. pl. 2. S. C. accordingly, becauſe the right being determined after judgment the tort is more than perſonal.

33. A. *receives money due to the teſtator;* the executor brings aſſumpſit for money had and received to his uſe as executor; the bringing the action is an *aſſent* to the receipt, and makes it a receipt in his own right, and it is immediate aſſets in his hands. 6 Mod. 92. Hill. 2 Ann. B. R.

34. *Judgment* was held *againſt J. S. as executor,* and now the *executor of the judgment creditor brought an action of debt againſt the ſaid J. S. ſuggeſting a devaſtavit in the life-time of his teſtator,* had judgment in C. B. upon default; and on a writ of error it was objected, that the plaintiff was not privy to the judgment, and therefore he ought firſt to have brought a ſcire facias and then have ſuggeſted a devaſtavit, according to WHEATLEY AND LANE'S CASE; but per Cur. *it lies for the executor of him to whom the wrong was*

6 Mod. 125. S. C. and after ſome difference between Holt Ch. J. and Powell, the record of the caſe of Wheatley v. Lane was

brought into court agreeing exactly with the declaration in this case; and the plaintiff had judgment.

*was done, though it lies not againſt the executor of him who did the wrong;* but here the defendant is the perſon againſt whom the recovery was, and he has admitted aſſets, and the executor may as well maintain this action as he may an action of debt for an eſcape where his teſtator might.. 1 Salk. 314. pl. 22. Mich. 2 Ann. B. R. Berwick v. Andrews.

——2 Ld. Raym. Rep. 971. S. C. accordingly.

## [ 129 ] (Q) What Actions Executor or Adminiſtrator ſhall have.

[1. IN an action of covenant by A. the executor of B. againſt C. upon *articles of covenant upon a deed made between B. and C.* in which the plaintiff declares upon the deed, and ſhews it at large, in which is recited *(concerning the ſum of* 2000 *l. agreed to be paid by the ſaid C. for monies before received of the Lady D. P.* wife of the ſaid * B. it is agreed by the ſaid articles between the ſaid parties that there were remaining in the hands of the ſaid C. of the ſum of 2000 l. the ſum of 1000 l. beyond (or over) divers particular ſums diſburſed by him to ſeveral perſons there named, by the aſſent of B. and then *B. covenants that the ſaid C. ſhall be ſaved harmleſs for the ſaid monies* remaining in his hands touching a ſuit in the Exchequer, and then *C. covenants with B. ſo that for long time as the ſaid ſum of* 1000 *l. ſhould remain in the hands of the ſaid C. he would pay* or cauſe to be paid *to the ſaid B. yearly and every year the ſum of* 100 *l.* at ſeveral feaſts by equal portions half yearly, the firſt payment to begin at Mich. after. And after *B.* (to whom the 100 l. is to be paid) *dies.* It ſeems that the ſaid 100 l. ſhall be paid to the plaintiff, the executor of B. at the ſaid feaſts, *ſo long as* the ſaid ſum of 1000 l. ſhall remain in the hands of C. For it appears upon the whole deed that the *ſaid* 1000 *l. were the monies of B.* inaſmuch as it is recited that they were delivered to C. by the Lady D. P. the wife of B. who could not have any monies which were her own proper monies. Alſo there is *an allowance made by B. of divers ſums parcel thereof* by (to) C. and this is a ſum engaged by B. to ſave C. harmleſs of the ſuit in the Exchequer, and the intent of the parties was, that C. ſhould pay the ſaid 100 l. ſo long as the 1000 l. ſhould remain in his hands. For the 100 l. was but intereſt for the 1000 l. and inaſmuch as the 1000 l. which is the principal, upon the whole deed appears to be the money of B. and after his death belongs to A. his executor, A. the executor ſhall have the intereſt ſo long as the 1000 l. remains in the hands of C. inaſmuch as the principal belongs to him. Trin. 1649. adjudged per Cur. upon a demurrer. POPHAM v. HUNT. Intratur M. 23 Car. B. R. Rot. 258.]

* In Roll it is P. but ſeems miſprinted.

[2. If *A. by his deed acknowledges to B. that he has in his cuſtody a bond of* 400 *l. in which C. is bound to B. and that he will be ready* at all times when he ſhall be thereunto *required to re-deliver* the aforeſaid writing obligatory *to the aforeſaid B.* and after *B. dies before any requeſt*

*requeſt* made, and after E. the executor of B. demands this obligation of A. and he refuſes to deliver it, E. ſhall have an action of *covenant* upon this deed, though the covenant was to deliver it to the teſtator upon requeſt, which implies that the requeſt ſhould be alſo by the teſtator, inaſmuch as the thing itſelf to be delivered, ſcilicet, the obligation, goes to the executor, and the executor repreſents the perſon of the teſtator, as in CHAPMAN'S CASE. Pl. C. 286. and ſo it is in every * *action upon a collateral promiſe.* P. 11 Car. B. R. adjudged per Cur. WALKER v. WALKER, upon a demurrer where it was ſhewn for cauſe that no demand was alleged to be made by the teſtator. Intratur Hill. 11 Car. Rot. 311.]

* Fol. 914.

## Againſt what Perſons. [ 130 ]

[3. A *villein executor may ſue his lord* for debt of the teſtator, and villeinage is no plea. 21 E. 4. 50.]

4. Executors may have writ of *covenant.* Br. Executor, pl. 161. cites Trin. 11 E. 3. and Regiſter, 165.

5. In aſſiſe, a man *ſeiſed of land, deviſable by teſtament, deviſed it to his executors to ſell,* and died, having two executors, of whom the *one died,* and the *other* executor *entered,* and a *ſtranger ouſted him,* and the *executor brought aſſiſe and recovered,* and a writ of error was brought, and the firſt judgment was affirmed, and ſo it ſeems that the executor has fee till he ſells, and there it is admitted that the one alone may ſell. Br. Aſſiſe, pl. 357. cites 39 Aſſ. 14.

6. *Debt* lies *for executor without ſpeciality;* where the *teſtator made a leaſe for his life rendering rent and died,* the executor ſhall have the action. Br. Executors, pl. 33. cites 44 E. 3. 42.

7. A *ſtranger takes goods of inteſtate.* Afterwards adminiſtration is granted. The adminiſtrator ſhall puniſh the *meſne treſpaſſor* with *relation* from the death of the inteſtate. Mo. 132. cites 18 H. 6. 22. S. P. by Roll Ch. J. and of trover and converſion, otherwiſe there would be no remedy for the wrong done. Sty. 341. Mich. 1652. Long v. Hebb.

8. If *action* be brought *againſt executor and J. B. who is not executor, and by name of executor, and he who is not executor confeſſes the action,* the executor ſhall have action of *diſceit.* Br. Executor, pl. 146. cites 9 E. 4. 13.

9. Executor ſhall have *debt of arrearages of annuity due to the teſtator in his life.* Br. Executor, pl. 169. cites 9 E. 4. 48.

10. *Trover and converſion* lies by executor on converſion in the life of the teſtator. Lat. 168. cites 5 Rep. 27. [Hill. 26 Eliz. B. R. Ruſſell's caſe.] Mo. 146. pl. 289. S. C. & S. P. admitted —— And. 177. pl. 212. S. C. —— Ibid. 243. S C. cited per Cur. —— 4 Le. 44. pl. 120. 32 Eliz. in Cam. Scacc. Ruſſell v. Pratt, S. C. but no judgment. —— Le. 93. pl. 2-8. Mich. 31 & 32 Eliz. in Cam. Scacc. S. C. adjudged. —— Vent. 30, 31. S. P. obiter Arg. and admitted per Cur. Paſch. 21 Car. 2. B. R.

11. *A. and B. covenanted on one part, and H. on the other part;* and it was agreed *that H. ſhould enter into a bond to pay* 100 *l. to B.* Bulſt. 25. Yate v. Roules, S. C. but who

not exactly S. P.—— 2 Brownl. 207. S. C. ſtates it that there were three covenantees, and adjudged that the covenant ſhall ſurvive to the other covenantees, and not well brought by the adminiſtrator, and reſolved alſo that the words being that he would enter into bond, and ſays not to whom, it ſhall be intended to the covenantees, and though the ſolvend' is only to one of them, yet that is very good, and judgment accordingly.

*who ſoon after died*, and *his adminiſtrator brought* an action of *covenant againſt H. for non-payment* of the 100l. to B. in his life-time; and adjudged that the action was not maintainable; for though the money was to be paid to B. who is dead, yet *A. who ſurvives, and is party to the indenture for B. to this purpoſe, are all one perſon; but after both their deaths, the executor or adminiſtrator of the ſurvivor ſhall have the action.* Yelv. 177. Trin. 8 Jac. B. R. Rolls v. Yate.

12. A. *lent money to B.* and *B. promiſed to repay the ſame upon requeſt*; A. died without making any requeſt; yet a *requeſt by the executor is ſufficient*; and judgment for the plaintiff. 3 Bulſt. 259. Mich. 14 Jac. Davenport v. Wood.

[ 131 ] 13. *Detinue* lies, becauſe the property continues; per Doderidge J. Lat. 168. Trin. 2 Car.

14. In *debt by adminiſtrator* defendant *pleaded a releaſe of the plaintiff which bore date before the letters of adminiſtration*, as appeared by the record; but judgment for the plaintiff by Crew, Doderidge, and Whitlock. Palm. 411. Paſch. 1 Car. B. R. Barefoot v. Barefoot.

Vent. 30. Juſtice Moreton's caſe, S. C. held clearly for the plaintiff, and ſaid it had been formerly reſolved ſo in the Exchequer-chamber.

15. Executor ſhall have *debt on ſtatute* 2 *E.* 6. *for tithes*, but ſhall not be charged in ſuch action. Sid. 407. pl. 19. Hill. 20 & 21 Car. 2. B. R. Morton v. Hopkins.

Vent. 175. S.C. & S.P. agreed by all the juſtices.—— 2 Keb. 831. pl. 54. S. C. & S. P. adjudged.

16. B. ſold land to A. in fee, and *covenanted* with A. his heirs and aſſigns *for quiet enjoyment*. The *land is evicted*. Executor of A. ſhall ſue the action and recover damages. 2 Lev. 26. Mich. 23 Car. 2. B. Lucy v. Levingſton.

17. In *trover* by the adminiſtrators *for converſion mean between the death of the inteſtate, and the adminiſtration committed*: Thomſon excepted in arreſt of judgment that this converſion was before the adminiſtrator's title, ſed non allocatur; for the adminiſtration ſhall relate to the inteſtate's death; and judgment for the plaintiff. 3 Keb. 206. pl. 3. Mich. 25 Car. 2. B. R. Chambers v. Pattiſon.

18. A. poſſeſſed of a great perſonal eſtate made B. his father and M. his wife executors, and directed his perſonal eſtate to be turned into money, and laid out in land. A. died. B. and M. proved the will, and purchaſed lands with 3900 l. which by the will was to be ſettled on M. for life, and after on J. S. and his heirs. A bill was brought by J. S. againſt B. and M. charging that they had converted money to their own uſe. M. by anſwer ſet forth, that her father died about a month before A. and made a nun-

a nuncupative will, by which he *deviſed all his eſtate to the now teſtator A. and to M. his wife, now one of A.'s executors*, which will was proved, and adminiſtration was taken out by R. and M. with the will annexed, and that M. and B. intruſted W. R. to diſpoſe of the *ſeveral eſtates of A. and D.* and that W. R. kept an account thereof. The Court held that the *taking adminiſtration by A. and M. as univerſal legatees* was a ſufficient *aſſent* to the bequeſt, *and thereby the whole eſtate of D. veſted in A. the huſband, except debts unreceived* and choſes en action, and was ſubject to his will, and ordered that debts of D. unpaid at A.'s death ſhould be paid out of the debts unreceived in the firſt place. Fin. R. Trin. 30 Car. 2. Gundry v. Brown.

19. If an *executor ſtates an account with a debtor, he may*, if he pleaſes, afterwards *ſue in his own name* for this debt, for the ſtating of the account raiſeth a new debt, *or* he may ſue *as executor*. Freem. Rep. 538. pl. 728. Trin. 1681. Needham v. Croke.

20. Executor brought a writ of *error to reverſe an attainder of high-treaſon of his teſtator*, and Holt Ch. J. doubted, whether it lay for the executor; for by reverſal the blood and the land is reſtored, which is of no advantage to him, and the goods were forfeited by the conviction of the teſtator, and not by the attainder; but the other three juſtices againſt him; for he is privy to the judgment, and may have loſs thereby. 1 Salk. 295. pl. 1. Trin. 1 W. & M. B. R. The King v. Ayloff. Show. 13. S. C. Holt at firſt doubted, it being in the caſe of treaſon; but at laſt all the Court held that there was no difference between treaſon and felony as to this point, and that the executor being injured by an erroneous attainder might bring the writ of error; though by ſome it is neceſſary to aver a perſonal eſtate; for otherwiſe an executor is not damnified.

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21. *Aſſumpſit* lies for an executor for a *copyhold-fine ſet* by the teſtator; per three juſtices againſt Holt Ch. J. 3 Lev. 262. Trin. 1 W. & M. in C. B. Shuttleworth v. Garnet. Carth. 90. S. C. adjudged for the plaintiff by three judges againſt the opinion of Holt Ch. J. who held that it ought to be an action of debt, and not an indebitatus aſſumpſit. ——Show. 35. S. C. adjudged for the plaintiff by three juſtices, Holt diſſentiente.

22. An executor may maintain *trover* in his own name *before the ſeiſure* of the goods, *or probate* of the will. Per Cur. Carth. 154. Trin. 2 W. & M. in B. R. in caſe of Frederick v. Hook. Becauſe the property ſtill continues and does the wrong to his eſtate. Arg. 4 Mod. 404. ſays it has been ſo held. ——He has ſuch immediate poſſeſſion of the teſtator's goods that he may maintain trover for them. 6 Mod. 181. Trin. 3 Ann. B. R. in caſe of Jenkins v. Plume. ——And naming himſelf executor is nothing but ſurpluſage. Lat. 163. in caſe of Hogton v. Hogton. Per Dodderidge J. and ſaid to have been reſolved 11 Jac. Jermin v. Beſt. —— Of goods taken from his teſtator he muſt firſt make a demand before he can bring his action. Clayt. 122. pl. 215. Aſſiſa March 1647. before Germine J. of B. R. Coldwell's caſe.

23. *Demandant in dower* dies before writ of inquiry executed; adminiſtrator cannot bring ſcire facias for the *damages and meſne profits*. 1 Salk. 252. pl. 1. 2 Trin. W. & M. in B. R. Mordant v. Thorold. Carth. 133. S. C. held accordingly. And per Holt Ch. J. the judgment given in this caſe was altogether in the realty, and an adminiſtrator cannot have execution of any judgment but only in the perſonalty. ——Show. 97. S. C. and by Holt Ch. J. till the damages are aſſets no intereſt veſts, and judgment for the defendant. ——3 Lev. 275. S. C. and the Court inclined to ſuch opinion, and Doiben J. remembered the caſe of Ayloff v. Roberts in C. B. Mich. 13 Car. 2. where after judgment in dower, and a writ of ſeiſin executed the tenant died, and the demandant brought

brought ſcire facias againſt the heir, and tertenant to have the damages, and adjudged that it did not lie. But Curia adviſare vult, it being a new caſe.——3 Mod. 281. S. C. the Court was of the ſame opinion; ſed adjornatur.

24. *Three* were *joint merchants* of a ſhip, *two died* and left executors who adminiſtered; the ſurvivor alone brought trover againſt one that carried away the ſhip, the defendant pleaded the jointenancy of the two deceaſed in bar, but judgment was for the plaintiff, for it is a plea in abatement only. 3 Lev. 290. Hill. 2 W. & M. in C. B. Kempe v. Andrews.

2 Mod. 149. Arg. S. P. in the caſe of Abraham v. Cunningham.

25. If a *widow* after the death of her huſband *ſeize his goods without taking adminiſtration*, though ſhe afterwards diſpoſed of them by will or otherwiſe, yet he that takes out letters of adminiſtration may bring *trover* for theſe goods; for an adminiſtrator may have *trover* for goods taken after the death of the inteſtate, and before adminiſtration committed, and though he declares of goods taken out of his poſſeſſion, whereas they were taken before he was adminiſtrator, yet it is good enough, for the adminiſtration ſhall have relation to the death of the inteſtate; per Holt Ch. J. at Guildhall, though he thought it a hard caſe. Cumb. 451. Trin. 9 W. 3. B. R.

26. If *executor lives at London*, and *goods which teſtator died poſſeſſed of are at Briſtol*, yet the *executor has ſuch immediate poſſeſſion of them, that he may maintain trover for them* in his name againſt any convertor of them, and the damages recovered ſhall be aſſets in his hands. Per Holt Ch. J. 6 Mod. 181. Paſch. 3 Ann. B. R. in caſe of Jenkins v. Plombe.

27. M. de Devon the plaintiff brought an action upon the *caſe*, as adminiſtratrix of Sampſon de Veſe de Lake v. Powlett, *upon a promiſe* made to him *to pay upon his marriage to the inteſtate or his order, his heirs or executors, the ſum of* 50 *guineas*, and did *not aver*
[ 133 ] *that the money was not paid to the inteſtate's heir*; the plaintiff had judgment upon nihil dicit, whereupon the defendant brought a writ of error in the Exchequer-chamber, where this caſe was twice argued; the counſel for the plaintiff in error inſiſted that the declaration was bad, becauſe by the promiſe the money was made payable to the inteſtate or his order, his heirs or executors, and the plaintiff had not averred that it was not paid to his heir, to whom by the very terms of the contract it was made payable as well as to his executors. But Cowper Ld. Chancellor, Parker Ch. J. de B. R. and King Ch. J. de C. B. *reſolved that the declaration was good without ſuch averment, the thing contracted for being a mere perſonalty*; for by the law all perſonalties and rights to the perſonalties are given to the executors or adminiſtrators, as all realties and rights to realties are given to the heir; the executors or adminiſtrators being repreſentatives of a man, in reſpect of his perſonalties, in like manner as the heir in reſpect of the realties; therefore if a man enters into an obligation to pay to another or his heirs a ſum of money, his executors or adminiſtrators, and not his heirs ſhall have it; ſo if one enters into a recognizance according to 23 H. 8. cap. 6. the form whereof as ſet down in the ſtatute is ſolvend' eidem J. hæredibus vel executoribus, his executor, and

not his heir, ſhall have the benefit of it, and judgment was after entered termino Mich. 1 Geo. in Scacc. Devon v. Pawlett.

28. One having a baſtard *leaves a perſonal eſtate to her executor in truſt for the baſtard, who dies inteſtate, and without wife or iſſue.* The executor brings a bill againſt one who has part of this perſonal eſtate in his hands. The defendant demurs, becauſe the Attorney General and the adminiſtrator of the baſtard are not parties; demurrer diſallowed, for that the executor has the legal title, and conſequently may ſue for the eſtate. 3 Wms.'s Rep. 33. Hill. Vac. 1729. Jones v. Goodchild.

29. A *landlord who had rent due to him, died inteſtate;* after which *the plaintiff in action ſued out execution againſt the defendant, who was tenant, and levied the debt upon him; after this adminiſtration was committed to J. S. who* thereupon *came into the court, and moved for a rule on the ſheriff to pay him a year's rent out of the levied monies, purſuant to* 8 *Ann. cap.* 17. urging that though he was no adminiſtrator at the time of ſerving the execution, yet as ſoon as the adminiſtration was committed, it had relation to the death of the inteſtate, and he might bring trover for goods taken between the death of the inteſtate, and commiſſion of the adminiſtration; but the Court held, that relations which are but fictions at law, ſhould never deveſt any right legally veſted in another between the death of the inteſtate, and the commiſſion of adminiſtration; and the plaintiff in the action having duly ſerved his execution before the adminiſtrator had a right to demand his rent, it was not reaſonable the plaintiff ſhould be defeated by any relation whatſoever; they did not in that caſe deny the authorities which gave the adminiſtrator trover by relation, but went on a diſtinction that will govern this caſe between relations that are to defeat lawful acts, and ſuch as are to puniſh thoſe that are unlawful. Cited by Sir John Strange. Gilb. Equ. Rep. 223, 224. Trin. 4 Geo. B. R. Waring v. Dewbury.

Forteſcue's Rep. 60. S. C. held accordingly. —— S. C. held accordingly by Pratt Ch. J. Eyre and Forteſcue J. but Powis J. e contra; he held that execution was not to be ſtayed unleſs there was notice, but held that in this caſe the adminiſtratrix was intitled to it, becauſe the 8 Ann. cap. 17. ſays that no goods, &c. ſhall be liable to any execution, unleſs before removal of them the party ſuing ſhall pay, &c. which words he held bound the goods with the rent arrear in reſpect of the party ſuing, ſo that though the ſheriff not having notice removed them, they continued bound in his hands, and upon application the arrear ought to be paid by him, and that if they were ſold, and the money delivered to the party ſuing, he became chargeable with the arrear. (Quære, what remedy the landlord could have againſt the party ſuing after execution perfectly executed?) He alſo held that the adminiſtration ſhould have relation to the death of the inteſtate, becauſe by the eccleſiaſtical * law it is not to be granted within 14 days of an inteſtate's death, which the other juſtices denied, and ſaid that relations being fictions ought not to hold place againſt the rights of ſtrangers. It was agreed per tot. Cur. that though the landlord be the only perſon mentioned to whom the arrear is to be paid by the party ſuing, executors and adminiſtrators being the perſons upon whom the right to the arrears devolves are within the ſtatute. MS. Rep. S. C. and ſays, that Powis's opinion ſeems to be beter grounded than that of the other juſtices; for the ſtatute was made for the benefit of the landlord only, and with deſign to prefer his year's rent in arrear to the execution, and the words of the ſtatute, viz. unleſs the party ſuing execution ſhall before the removal of the goods pay to the landlord, &c. then the party ſuing execution, paying to the landlord, &c. may proceed, &c. ſeem plainly to make it incumbent upon the party ſuing to take notice whether there be a landlord, and what rent is arrear, and if by the removal of the goods without notice the landlord ſhall be excluded from demanding the rent in arrear, the ſtatute will be almoſt intirely ineffectual, ſince the landlord cannot but be preſumed to be a ſtranger to the proceeding againſt his tenant. MS. Rep.

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30. The executor of a landlord after the death of his teſtator had *rent due,* and goods of the tenant were taken in execution, and the *executor gave notice before the removal of the goods,* The Court held

Ibid. cites the caſe of Wyndham v. Palgrave. —— Ibid. 372. S. C.

held that an executor ſhall have the benefit of this act, as well as the landlord himſelf; for it is an intereſt veſted. Forteſcue's Rep. 359. Hill. 2 Geo. 2. B. R. Chace v. Chace.

Mich. 6 Geo. 1. but S. P. does not appear.

—— But in a manuſcript report I find it thus, viz. that an action on the caſe lies againſt the bailiff of a liberty for carrying away goods in a fi. fa. after he had notice of a year's rent due contrary to 8 Ann. cap. 17. this being an injury to teſtator's eſtate, and not a perſonal wrong, for the act prohibits ſuch a removal till rent paid. Mich. 6 Geo. B. R. Windham v. Palgrave.

## (Q. 2) Actions by Executors.

### Declarations.

1. TReſpaſs quod bona & catalla cepit, and *counted of corn*, &c. and well; quod nota per judicium. Br. Faux Latin, pl. 114. cites 46 E. 3. 16.

2. *Debt by J. N. adminiſtrator of the goods and chattels* which belonged to W. P. and *counted that the adminiſtration was committed to him by the ordinary, and* counted *of a duty due to himſelf;* by which the *defendant ſaid, that W. P. made an executor, who proved the teſtament after the adminiſtration committed*, and ſo the name adminiſtrator determined; *judgment of the writ;* and the beſt opinion was, that it is *only ſurpluſage*, which is no matter of the part of the plaintiff, for it is only addition, as J. N. of D. brought action, where he names himſelf Carpenter, and is not Carpenter. Contra of addition of the part of the defendant. Br. Dette, pl. 78. cites 9 H. 5. 5.

2. Treſpaſs by A. B. adminiſtrator of the goods and chattels which belonged to N. C. and *counted of* goods taken out of his own poſſeſſion, viz. *a cheſt ſealed with charters*, and becauſe his writ is of bona & catalla and counted as above, where *ſpecial writ is given by the regiſter*, quod ciſta ferat' cum chartis, &c. the writ ſhall abate, and if the writ be of bona & catalla, and he *counts of two horſes* taken, his writ ſhall abate, for of live chattel ſpecial writ is given in the Regiſter, quare duos equos, &c. For by gift of bona & catalla charters do not paſs, nor ſhall be forfeited by outlawry. Br. Faux Latin, pl. 88. cites 22 E. 4. 11, 12.

[ 135 ] 4. B. an adminiſtrator brought debt againſt B. and after iſſue found for the plaintiff it was moved in arreſt, that *action was brought April 2, 16 Jac.* and the *adminiſtration was laid in the declaration to be granted the 11th of May after.* So the judgment was ſtayed. Hob. 245. pl. 306. Trin. 6 Jac. Bickford v. Bickford.

5. An action was brought by an adminiſtrator, and *in the declaration theſe words were omitted, eo quod T. S. obiit inteſtatus.* Upon non debet pleaded the plaintiff had a verdict. It was inſiſted upon a writ of error, that this being matter of form, and not of ſubſtance, might be amended by the ſtatute 18 Eliz. Beſides, it is quaſi ſuperfluous to ſay that T. S. obiit inteſtatus, when it is ſet forth in the declaration ad reſpondendum to the plaintiff adminiſtratori, &c. But per Haughton, theſe words are not only matter

ter of form, becauſe it is traverſable; and per Chamberlain J. one may traverſe quod non obiit inteſtatus, and the judgment was reverſed. 2 Roll. Rep. 285. Hill. 20 Jac. B. R. Morton v. Beſwick.

6. *Aſſumpſit, &c.* by the plaintiff as *adminiſtrator of J. L.* wherein he *ſets forth that he had formerly left ſo much money in the hands of the defendant for the uſe of the inteſtate* J. L. *in conſideration whereof he promiſed to pay it to the inteſtate, or if ſhe died before* 18 *years old, then to pay it to her executors,* and ſhews that *ſhe died before* 18, and that he had not paid it to the plaintiff as her adminiſtrator licet ſæpius requiſitus. Upon non aſſumpſit pleaded the plaintiff had a verdict, and it was inſiſted in arreſt of judgment that the action ought to be brought by the plaintiff in his own right, and not as adminiſtrator, becauſe the promiſe was made to him; but adjudged that the naming himſelf adminiſtrator was but ſurpluſage. It was further objected, that he ſhould have averred that the defendant did not pay the money to J. L. during her life; ſed non allocatur; for this is cured by the verdict. Vent. 119. Paſch. 23 Car. 2. B. R. Horneſay v. Dimocke.

7. Where *money due to an inteſtate is paid to a third perſon to be paid over to the adminiſtrator,* the adminiſtrator muſt declare againſt the defendant *for ſo much money received to his uſe generally,* and *not ut adminiſtratori;* per Holt Ch. J. Carth. 336, 337. Hill. 6 W. 3. B. R. in caſe of Curry v. Stephenſon.

8. *But* where in the principal caſe the declaration was, that defendant *indebitatus fuit to the plaintiffs William and Anne ut adminiſtratici of one J. S.* for ſo much money by the defendant *ad uſum ipſorum W. and A. as adminiſtratrix, &c.* of J. S. *ante tempus illud habit' & recept'* which he promiſed to pay. Holt Ch. J. excepted to it; but it was anſwered, that in this caſe the plaintiffs could not declare otherwiſe, for this money was left in *caſh by the inteſtate, and defendant took it after inteſtate's death, and long before any adminiſtration granted.* But afterwards Holt held the declaration good enough, for it was now the uſual form in ſuch caſes. Carth. 335. Hill. 6 W. 3. B. R. Curry v. Stephenſon.

9. *Debt* was brought *by the plaintiff in jure ſuo proprio for the eſcape of a priſoner in execution upon a judgment recovered by the plaintiff as adminiſtrator.* And per Cur. the action is ill brought, for the firſt judgment being in right of the inteſtate, the action of eſcape ought to be in right of the inteſtate alſo. Ld. Raym. Rep. 36. Hill. 6 W. 3. B. R. Anon.

10. *In caſe of an executor, if he hath the probate at the time when he declares, it is well,* but it is *otherwiſe in the caſe of an adminiſtration;* here it appears by the declaration that the letters of adminiſtration were granted after the ſuit commenced, which is ill. Comb. 371. Trin. 8 W. 3. B. R. Martin v. Fuller.

11. *One ſues as adminiſtrator of J. S. without ſhewing that J. S. died inteſtate, yet* an *adminiſtration taken out of the archbiſhop's court ſhall be intended to be a good adminiſtration.* 3 Wms.'s Rep. 370. Trin. 1735. Tourton v. Flower & al'. [136]

## (R) How Executor may be made.

### By what Will.

[1. A MAN may make an executor by a *will nuncupative*, and he may ſue. 4 H. 6. 1. Curia.]

S. P. if it be under the ſeal of the ordinary, though it be not under the ſeal of the party. Br. Teſtament, pl. 8. cites S. C. —— S. P. But it ſhall be * proved before the ordinary by teſtes, and ſhall be under the ſeal of the ordinary. Br. Executor, pl. 131. cites S. C. and cites 10 E. 4. 1. per Choke contra. —— * S. P. Br. Teſtament, pl. 14. cites 14 H. 6. 5. —— So if proved by the biſhop. Ibid. pl. 3. cites 5 H. 5. 1. —— Br. Teſtament, pl. 16. cites S. C. accordingly, unleſs it be put in writing after, and therefore it is uſed to prove it per teſtes before the ordinary, and then to write it.

2. If the *date of the probate* of the teſtament *be elder than the date of the teſtament;* the ſame executors ſhall never have action upon it. Br. Executor, pl. 23. cites 18 E. 2. and Fitzh. Feoffments, 110.

3. If a man *makes J. N. his executor and deviſes goods to him and to W. S.* to deviſe *for his ſoul*, W. S. is executor of theſe goods by theſe words as well as J. N. is. Br. Executors, pl. 98. cites 30 Aſſ. 22.

4. *Debt by A. and B. executors* of the teſtament of O. againſt R. who demanded over of the *teſtament* and had it, which *was, I will that A. and B. ſhall be my executors, and alſo that J. and K. be coadjutors of the ſame A. and B. to diſtribute my goods;* Portington demanded judgment of the writ; for J. and K. are executors, who are alive and not named, and becauſe they are only coadjutors, and cannot adminiſter nor prove the teſtament, therefore by judgment the writ was awarded good. Br. Executors, pl. 73. cites 21 H. 6. 6.

5. *But* if the words had been *that J. and K. ſhall have adminiſtration of my goods*, this makes them executors. Ibid.

6. A man made his laſt will and did will thereby that *none ſhould have* any *dealings with his goods* until his ſon comes to the age of 18 years *except J. S.* By this J. S. was executor during the minority of his ſon. Cited by Rhodes J. Cro. E. 43. in pl. 2. to have been ſo ruled in 17 Eliz.

7. And he ſaid it had been adjudged, that where one on his death-bed ſaid to his wife that ſhe ſhould *pay all and take all*, that by this ſhe was executrix. Ibid.

8. Teſtator made B. an *infant* of four years old his executor, and by his will appoints that *J. D. during the nonage of the infant ſhall have the diſpoſition of his goods.* Debt ſhall be brought againſt J. D. during the infancy, for during that time he is executor. Cro. E. 164. pl. 10. Mich. 31 & 32 Eliz. in Scacc. Pemberton v. Coney.

This ſhall not be conſtrued as a condition precedent, but as a condition to abridge her power to be executrix if ſhe perform it not. Ibid. —— Le. 220. pl. 311. S. C. adjudged accordingly by all the juſtices, though Anderſon Ch. J. at firſt held e contra.

9. A. deviſed a term to B. and ſays, *if C. his wife ſuffers B. to enjoy the term three years, then ſhe ſhall have all his goods as executrix.* She is executrix preſently, for though in grants eſtate ſhall not veſt till the condition precedent be performed, yet it is otherwiſe in a will. Cro. E. 219. pl. 7. Hill. 33 Eliz. B. R. Jennings v. Gower.

* 10. Though

10. Though one do not expreſsly by will name or appoint any to be executor, yet *if by* any word or *circumlocution he recommends* or commits *to one or more the charge* and *office which pertains to an executor*, it amounts to as much as the ordaining or conſtituting of him or them to be executors. Went. Off. Executor, 8.

11. *As*, if he declare by his will *that A. B. ſhall have his goods after his death to pay his debts, and otherwiſe to diſpoſe at his pleaſure*, or to that effect; by this is A. B. made executor, as was conceived by the judges in the late queen's time. Went. Off. Executor, 8.

12. *And* long before that it was held, that if one do will only *that A. B. ſhall have the adminiſtration of his goods*, he is thereby made executor. Went. Off. Executor, 8, 9.

13. *Yea*, in the ſaid late queen's time, one giving divers legacies, and then appointing *that his debts and legacies being paid, his wife ſhould have the reſidue of his goods, ſo that ſhe put in ſecurity for the performance of his will*; by this, without more, was ſhe an executrix, as was held by three juſtices, viz. Manwood, Harper, and Mounſon, in the Ld. Dyer's abſence. Went. Off. Executor, 9.

14. If *A. be made executor*, and the *teſtator after* in his will *expreſſeth that B. ſhall adminiſter alſo with him, and in aid of him*, here B. is an executor as well as A. and *if A. refuſe, B. alone may prove the will as executor* notwithſtanding it be only ſaid he ſhall adminiſter with A. and in aid of him. Went. Off. Executor, 9.

15. *But if A. be made an executor and B. a co-adjutor* without more, he is not by this an executor with A. as in King H. 6th's time was held; *nor hath ſuch co-adjutor or overſeer any power to adminiſter or intermeddle otherwiſe than to counſel*, perſuade, and adviſe. Went. Off. Executor, 9.

16. I make my wife *my full and whole executrix of all my cattle, corn, and moveable goods.* Teſtator ſays nothing of what ſhall be done with the reſidue of his eſtate, as leaſes and debts. Per Jones and Crook J. ſhe is ſole and abſolute executrix for the whole eſtate, as well as leaſes and debts, and other things, for that it is but an enumeration of particulars, and no excluſion of any, eſpecially not making other executor for the reſidue; but Berkley J. contra. Cro. C. 292, 293. pl. 3. Hill. 8 Car. B. R. Roſe v. Bartlett.

17. The words of a will were, *I deviſe all my perſonal eſtate to my two daughters and my wife, whom I make my executrix.* It was declared in the eccleſiaſtical court that this made them all three executrixes. Vent. 102. Mich. 22 Car. 2. B. R. cites the caſe of Hatton v. Maſcue.

## (S) In what Manner they may be made.

[1. A MAN may make two executors, and *that if they refuſe, two others ſhall be* executors. 3 H. 6. 6. b.] S. P. Br. Executor, pl. 9. cites 3 H. 6. 7. S. C. ——Br. Expoſition de Terms, pl. 7. cites S. C. adjudged that the two laſt ſhall not be executors but upon refuſal of the firſt. ——Br. Condition, pl. 10. cites S. C. ——Fitzh. Brief, pl. 11. cites S. C.

And in debt by the four the writ was abated, for

[2. And in this caſe, if *the two firſt adminiſter*, the two laſt ſhall not be executors, nor named in actions; but otherwiſe it is if the firſt two refuſe. 3 H. 6. 6. b.]

the two laſt are not made executors but upon condition implied, viz. if the two firſt refuſe; quod nota. Br. Executor, pl. 9. cites S. C. —— See the notes at pl. 1.

This one is ſole executor, for none is executor if he cannot adminiſter.

[3. If a man makes *three executors, and commits the adminiſtration to one only*, whether they are all executors, or only he to whom the adminiſtration is limited? Dubitatur. 3 H. 6. 6. b. 7. But 19 H. 8. 8. b. is in the affirmative, becauſe the limitation is void.]

Per Martin. Br. Executor, pl. 9. cites S. C. —— A man makes A. and B. his executors, and willed that B. ſhould not meddle during the life of A. and well; for this does not reſtrain his intire power. Br. Executor, pl. 155. cites 32 H. 8.

Though in the premiſes of a will two be made executors jointly and equally, yet there may be a proviſo that one ſhall not meddle during the other's life, ſo as they ſhall be executors ſucceſſively, and not jointly; and thus alſo to other purpoſes aforeſaid, a ſubſequent clauſe or proviſo may make the partition and diviſion of authority. But if the proviſo or clauſe ſubſequent be merely contrary to the premiſes, it will be void; as where two were made executors, with a proviſo or clauſe that one of them ſhould not adminiſter his goods, this was held void for repugnancy by Brudenel and Englefield J. but Fitzherbert J. was of the mind that it was not void, nor utterly repugnant, for the other might join in ſuits though not adminiſter; and Juſtice Shelley was of a third opinion from all the reſt, viz. that there was a repugnancy, but the laſt clauſe ſhould controul the premiſes; and ſo this one only ſhould be executor. Went. Off. Ex. 13, 14.

D. 48. S.P. —— S. P. as one executor of his plate, and another executor of his other goods, and other executors of his debts, and may make the one his executor of his goods in one * county, and another of his goods in another county. Br. Executor, pl. 2. 19 H. 8. 3. per Fitzh. ——So one executor of his goods in B. and another executor of his goods in S. Ibid. pl. 155. cites 32 H. 8.

[4. A man may make *one* executor *for part, and another* executor *for the reſidue*. H. 17 Jac. B. Austree against Audley.]

* S. P. per tot. Cur. 2 Sid. 114. in an anonymous caſe. —— 1 Sid. 101. S. P. accordingly, but adds a quære, in caſe of Hammond v. Moore.

5. A. *conſtituted B. and C. his executors*, and *if they would not take upon them* the executorſhip, *then* he appointed *D. and E.* and after B. and C. refuſed. By this D. and E. are executors, and B. and C are not; ſo that in actions brought for debts of the teſtator, B. and C. need not join or be named. Went. Off. Ex. 10, 11. cites 3 H. 6. fol. 6.

6. Teſtator wills that *A. and B. ſhall be his executrix, and that J. and K. ſhall be executors of A. and B. to diſpoſe of his goods*. They are all executors. D. 4. pl. 10. Marg. cites 21 H. 6. 6. b. per Paſton.

S. C. cited D. 3. b. 4. a. pl. 7. Trin 19 H. 8. —— But though in the premiſes of a will two be made executors jointly and equally, yet there may be a proviſo that one ſhall not meddle during the other's life, ſo as they ſhall be executor ſucceſſively and not jointly. Went. Off. Ex. 13. cites 32 H. 8. Br. Executor, 55.

7. Note per Brudenel and Engleſield, if a man *makes B. and C. his executors, proviſo that B. ſhall not adminiſter*, this proviſo is void, for this reſtrains the power of executor. But per Fitzh. this is a good proviſo, and B. may bring action, but not adminiſter; quære inde. Br. Executor, pl. 2. cites 19 H. 8. 3.

8. A. made B. and C. executors, and adds, *I will that C. ſhall pay my other executor* all ſuch debts as he owes me, *before he meddle with any thing of this my will*, or take any advantage of this my will

will for the diſcharge of the ſame debts, for there I have made him one of * my executors. C. cannot adminiſter or be executor before he pays the debts, and pleading payment is not ſufficient; but he muſt ſhew acquittance of the co-executor, and alſo ſhew in certainty what debts they were. 3 Le. 2. pl. 6. Mich. 1 & 2 P. & M. Stapleton v. Truelock.

9. A. deviſed that *if his wife ſuffer B. to enjoy Bl. Acre for three years* (Bl. Acre being part of her jointure), then ſhe ſhould be his executrix. Per all the juſtices, except Anderſon, the wife *was executrix preſently* before the three years expired, and that by diſturbance of B. by the wife within the three years the executorſhip ſhall be determined, and transferred from her to B. Dyer, 4. pl. 8. Marg. Paſch. 23 Eliz. C. B. Alice v. Frances. Went. Off. Ex. 11. cites S. C. as ſo held by all the judges except Ld. Anderſon.

10. A man by his own election cannot renounce for one part, and continue executor for other *part*, nor can executor *bring action as adminiſtrator*. Brownl. 82. Mich. 15 Jac. Anon. Or be ſued as adminiſtrator. Cro. E. 41. Anon. cites D. 3. and Br. Executor, 155.

11. It is uſual to make one or more executors conditionally, *that they put in ſecurity to pay legacies*, or in general to perform the will; nor was it ever doubted, as I think, but that this was good; yet I ſhould adviſe that ſuch condition be plainly thus expreſſed, viz. either thus, that *if J. S. do put in ſecurity*, &c. *by ſuch a day*, then he ſhall be executor, elſe not; or thus, viz. to make him executor conditionally, that before he do adminiſter (funeral perhaps excepted) he ſhall put in ſuch ſecurity, elſe perhaps, he being executor till the condition broken, in that mean time he may have diſpoſed of all, or moſt part of the teſtator's eſtate. Went. Off. Ex. 11.

12. A man may make A. and B. his executors, and that *A. ſhall not intermeddle during the life of B.* Fin. Law, 8vo. 168. The time may be limited when he ſhall firſt begin to be executor, and that either certainly, or upon ſome contingency. Went. Off. Ex. 10.

13. A man may make *A. executor touching goods in D. and B. executor* touching goods in S. Fin. Law, 8vo. 169. See D. 4. pl. 8. and Fitzherbert J. accordingly, but Englefield J. contra.

14. One may appoint the *executor of A. to be his executor*, and then if he dies before A. dies, he is inteſtate until A. dies. Went. Off. Ex. 10.

15. Executor may be made *conditionally*, and the condition may be either *precedent or ſubſequent*. Went. Off. Ex. 11.

16. A man may make *ſeveral* executors, one *quoad* things real, the other quoad things perſonal, and may divide the authority, yet quoad creditors they are all executors, and as one executor, and may be ſued as one executor. Cro. Car. 293. pl. 3. Hill. 8 Car. B. R. Roſe v. Bartlet.

## (T) What Perſons may have Executors or Adminiſtrators.

[1. D. 14 El. 309. 76. no adminiſtration committed of a man becauſe he was *attaint*.]

As of obligation made to her during the coverture and of paraphonalia, viz. her apparel. Br. Teſtament, pl. 13. cites S. C. per Vaviſor.

[2. *Feme with conſent of her baron*, may make executor of things which the baron ſhall not have by her death. 18 E. 4. 11. b.]

A monk profeſſed cannot make executors; becauſe he is a dead perſon in law. Per Babington Ch. J. Br. Teſtament, pl. 9. cites 4 H. 6. 31. But Crooke ſays, quære if a monk be made executor, whether he may not make a teſtament for the advantage of the firſt teſtator, ſo as ſome perſons be authoriſed to ſue for the firſt teſtator's debts.

[3. An *abbot* cannot make executors. 18 E. 4. 16.]

Br. Executor, pl. 131. refers to the S. C. ——— Br. Teſtament, pl. 9. cites S. C. but ſee pl. 2. and the notes there. ——— Fitzh. Executor, pl. 5. cites S. C.

[4. A *feme* may make an executor *with the aſſent of her baron*. 4 H. 6. 31. b.]

Debt by W. N. executor of the teſtament of A. his feme executor of the teſtament of H. B. againſt the defendant of 20 l. upon obligation of the firſt teſtator H. B. Rolf ſaid, a feme covert cannot make a teſtament. But per Babington Ch. J. a feme covert * by licence of her baron may make executors, ſo that if the baron agrees to the teſtament this is good enough; and the uſer of this action is a good agreement of the baron by matter of record; for a feme covert may have advantage of things; as if a man binds himſelf by obligation to a feme covert, the obligation is good. But Martin J. held ſtrongly againſt it. But notwithſtanding this, the defendant was awarded to anſwer over; quod nota. And Brook ſays, it ſeems to him that it is good reaſon that ſhe ſhall make a teſtament as here, becauſe ſhe was executrix of another, and none can have action due to the firſt teſtator, if ſhe ſhould not make a teſtament. Br. Teſtament, pl. 9. cites 4 H. 6. 31.

[5. A *feme covert* may make an executor of goods, which ſhe has as *executrix*, *without his aſſent if he will agree to it afterwards*. 4 H. 6. 31. b. adjudged.]

[6. But a *feme covert* cannot make an executor without the aſſent of the baron. 4 Rep. 51. b. Ognell's caſe. 4 H. 6. 31. b. admitted.]

* S. P. by which the aſſent was traverſed. Br. Teſtament, pl. 21. cites 5 E. 2. 26 E. 3. and Fitzh. Deviſe, 24 and Vet. Nat. Br. ——— And alſo if executor of the feme after her death proves the teſtament with the aſſent and will of her baron, this is good. Ibid. ——— But it was ſaid for law, 34 H. 8. that if the baron after the death of his wife commands the probation of the teſtament, this is not good, and the teſtament ſhall never take effect, and ſo it was put in ure the ſame year at St. Albans. ——— Br. Deviſe, pl. 34. cites S. C. ——— Ibid. pl. 11. cites 12 H. 7. 22, 23, 24. S. P. by Keble, quod Fineux Ch. J. conceſſit.

### Who may be Executor.

Fol. 915.

Went. Off. Ex. doubts this point as to corporations compound, or conſiſting of divers perſons. 1ſt, Becauſe they cannot be feoffees in truſt to the uſe of others. 2dly, They are a body framed for a ſpecial purpoſe. 3dly, They cannot come to prove a will, or at leaſt to take an oath as others do.

[7. A *mayor and commonalty* may be executors. 12 E. 4. 9. b. admitted.]

[8. A

[8. A *fryer profeſſed* may be executor *with his prior*. 7 H. 4. 2. b.] A man may be an executor notwithſtanding his profeſſion; for this is a thing ſpiritual, as it was agreed there. But the executor ought to be by aſſent of his ſovereign as it ſeems; for he cannot maintain action but in the name of himſelf and his ſovereign, as it is ſaid elſewhere. Br. Nonability, pl. 2. cites 3 H. 6. 23.

[9. A *monk* may be executor without aſſent of his ſovereign. 3 H. 6. 24. b. 18 H. 6. 4.] A monk profeſſed may be executor and may ſue debtor if his ſovereign joins with him, but not otherwiſe. Br. Executor, pl. 68. cites 19 H. 6. 25.——Ibid. pl. 75. S. P. cites 21 H. 6. 30.——Br. Nonability, pl. 18. cites S. C.

[10. A *villein* may be executor to another. 18 H. 6. 4.] Went. Off. Ex. 15, 16. S. P.——Co. Litt. f. 191. and Co. Litt. 124. a. S. P.—Roll. Rep. 147. cites 22 H. 6. 4. b. S. P.

[11. And the lord cannot take the goods from him, for he has them to the uſe of the teſtator. 18 H. 6. 4.] Litt. f. 192. and Co. Litt. 124. a. S. P.——Roll. Rep. 147. cites 14 H. 6. 14. S. P.

[12. A *feme may make her baron executor* of goods which ſhe has as executrix, if he will accept it. 4 H. 6. 31.] She may make her own baron her executor, and if ſhe dies he ſhall have action thereupon. Br. Executor, pl. 98. cites 39 H. 6. 27.——S. P. For otherwiſe none may have recovery of an obligation, recognizance, &c. which were to a feme dum ſola fuit, nor of goods of the feme carried away before the coverture, and theſe the baron may demand as executor, but not as baron, and theſe ſhall go as to the executors, and not as to his own uſe; per Priſot and Chocke; and therefore by them action well lies for the baron as executor of his feme by her teſtament. Br. Teſtament, pl. 10. cites 39 H. 6. 27.——Note per Keble, That a feme covert who was executor to another man before may make teſtament and make her baron, or another her executor to recover the debts of the firſt teſtator, or her own debts due to her before the coverture; which Fineux Ch. J. agreed, and that ſhe may do it without the aſſent of her baron, and likewiſe of things whereof ſhe had not the poſſeſſion; but of things in poſſeſſion ſhe cannot make teſtament without aſſent of her baron. And if the baron prove the teſtament, this is a good proof of his aſſent; quod nota. Br. Teſtament, pl. 11. cites 12 H. 7. 22, 23, 24.

[13. If a * *monk* be made *executor* he with his abbot may bring action of debt as executor; for it is a thing ſpiritual to be executor. Br. Nonability, pl. 42. cites 7 H. 4. 2.] * S. P. and may make a releaſe or acquittance concerning it; and it ſhall be good in law. Br. Executors, pl. 115. cites 21 E. 4. 13.

14. Raviſhment of ward by *two executors* whereof *the one was a prior and the other his confrere*, and it was pleaded in diſability, becauſe he was a fryer profeſſed. Per Thirſby he may be executor with his prior, by which, &c. Thirn. [ruled the defendant to] anſwer, quod nota. Br. Nonability, pl. 11. cites 7 H. 4. 2.

15. *Feme covert* or *monk* may bring action alone without the baron and ſovereign; for it is *to another's uſe*. So of *executor* who is *outlawed*, this is no diſability as executor. For [it is] to another's uſe. Per Fairfax, quod Huſſey Ch. J. conceſſit; and per Jenney, if you are indebted to me, and I make your *villein* my *executor* and die, and the villein brings action as executor, he ſhall not be diſabled by the villeinage; and this was the opinion of all the Court. But the caſe of the feme covert was denied, but the caſe of the monk was not denied. Br. Nonability, pl. 38. cites 21 E. 4. 49, 50. [ 142 ]

16. It was adjudged that an *executor outlawed* may maintain action for the debt of the teſtator. Theloal's Dig. of Writs, lib. 1. cap. So of an adminiſtrator. Br. Nonability,

pl. 18. cites 21 H. 6. 30. by all the justices. cap. 15. ſ. 16. cites 14 H. 6. 14. and Hill. 21 H. 6. 30. and Mich. 21 E. 4. 49. accordingly.

admitted. ——Br. Executor, pl. 75. cites S. C. —— Cro. C. 9. Paſch. 1 Car. C. B. the S. P. ——Went. Off. Ex. 106. S. P. ——S. P. Becauſe the ſuit is en auter droit, viz. in the right of the teſtator, and not in his own right. Co. Litt. 128. a. ——S. P. And alſo becauſe the perſon whom he repreſents has the privilege of the law; and not ſuing for himſelf, where he has the advantage of another where that is no objection to his repreſentation, it is no objection but he ſhould be anſwered. Gilb. Hiſt. of C. B. 159. cap. 17.

17. An *infant* may be executor, and may make a releaſe or acquittance concerning it; and it ſhall be good in law. And the reaſon is inaſmuch as if they ſhall be executors, it is reaſonable that they may do that which appertains to executors to do. Br. Executors, pl. 115. cites 21 E. 4. 13.

18. An action of debt was brought by an executor, the *defendant pleads an outlawry in the perſon of the executor*, and demands judgment if he ought to anſwer his writ; the plaintiff demurs in law to that plea; and judgment was given, that the defendant ſhould anſwer over. Brownl. 55. Anon. Hill. 36 Eliz.

19. If the next of kin are *attainted of treaſon and felony*, or have other lawful diſability, adminiſtration is not to be granted to them, but to ſuch as are lawful friends. 9 Rep. 39. b. Trin. 42 Eliz. in Henſloe's caſe.

Papiſt convict cannot be an executor; but otherwiſe he may.

20. A *popiſh recuſant convict* is diſabled to be an executor, adminiſtrator, or guardian, by the *ſtatute* 3 *Jac.* 1. *cap.* 15. *ſ.* 22. Per Holt Ch. J. 12 Mod. 306. Mich. 11 W. 3.

A feme popiſh recuſant convict and another were made executors, but the Court denied her to prove the will. Show. 293. Trin. 3 W. & M. in caſe of Hill v. Mills.

21. 3 *Jac.* 1. *cap.* 5. *ſ.* 10. *Every married woman, being a popiſh recuſant convict (her huſband notwithſtanding convicted of popiſh recuſancy) which ſhall not conform herſelf, but ſhall forbear to repair to ſome church or uſual place of common prayer, and within the year receive the ſacrament by the ſpace of one year next before the death of her huſband, ſhall forfeit the profits of two parts of her jointure, and two parts of her dower, and be diſabled to be executrix or adminiſtratrix of her huſband, and to have any part of her huſband's goods.*

——Comb. 185. S. C. & S. P. cited to have been ſo held.

22. By eccleſiaſtical law one *under the age of* 17, is not admitted to be executor. 6 Rep. 67. b. per Curiam. Mich. 4 Jac. C. B. in Sir Moyle Finch's caſe.

S. C. cited Cro. C. 9. in pl. 6. as adjudged. —Any alien whatſoever may be executor; cited by Bridgman Ch. J. Cart. 191. as 11 Jac. Sir Stephen le Sure's caſe.—And Ibid. 192. Paſch. 19 Car. 2. in caſe of Richfield v. Udall. Bridgman held, that an alien enemy executor may bring an action, and he may not be barred. And Ibid. 193. the ſame was agreed per Cur. ——S. C. argued, Cart. 48. Trin. 17 Car. 2. C. B.

23. Adminiſtrator brought debt on an obligation, the defendant pleaded that the plaintiff was *alien, born under the allegiance of P. king of Spain, enemies to the queen;* adjudged upon demurrer that he ſhould anſwer. Cro. E. 683. pl. 16. Trin. 41 Eliz. C. B. Brocks v. Philips.

24. An *excommunicate* perſon cannot ſue, that is, proceed in ſuit as executor till he be abſolved, there being danger of excommunication

munication to all that converſe with him; but this makes not a nullity of his executorſhip, nor overthrows the ſuit, but ſtays it only from proceeding until abſolution. Went. Off. Ex. 17.

25. Whether *corporations compound*, or conſiſting of divers perſons, may be made executors or not, I doubt, firſt, becauſe they cannot be feoffees in truſt to other's uſe; ſecondly, they are a body framed for a ſpecial purpoſe; thirdly, they cannot come to prove a will, or at leaſt to take an oath as others do. Went. Off. Ex. 17.

26. An *alien born* may be adminiſtrator, and have adminiſtration of leaſes as well as other perſonal things, becauſe he has them en auter droit, and not to his own uſe; reſolved per tot. Cur. Cro. C. 8, 9. Paſch. 1 Car. C. B. Caroon's caſe. S. C. cited per Hale Ch. J. Vent. 417.

27. Portion to be laid out in land to the uſe of the wife and iſſue, the remainder over, wife dies before the purchaſe, and the iſſue dies, leaving executor; the money decreed to the executor. Chan. Rep. 30. 4 Car. 1. Ferrers v. Ferrers.

28. The bill ſuggeſted, that the defendant did endeavour to ſet up a will, pretended to be made by one that died in the great ſickneſs in London, and that the defendant was executor of it; whereas there was no ſuch real *will*, but *obtained unduly, and that was conteſted in the ſpiritual court; yet the defendant in the interim being inſolvent, endeavoured to get in the debts due to the eſtate.* The defendant demurred, for that the bill contained no equity, and the ſuggeſtion of inſolvency might be made againſt every executor. But the demurrer was over-ruled; and upon motion it was *ordered, that the debtors to the defendant's eſtate ſhould forbear to pay any money till the matter ſettled in the ſpiritual court.* Chancery Caſes, 75. Paſch. 18 Car. 2. Smallpiece v. Anguiſh.

29. *Outlawry* is no bar to the ſuit of an *executor* in Chancery, becauſe he ſues en auter droit; per Ld. Keeper North. Vern. 184. pl. 183. Trin. 1683. Killigrew v. Killigrew.

30. The ordinary cannot refuſe probate to an executor, becauſe a *bankrupt*, as incapax, &c. becauſe the teſtator has thought him a proper perſon to be intruſted with his affairs; neither can the ordinary inſiſt upon ſecurity, and a mandamus lies to make probate. 1 Salk. 36. pl. 1. Mich. 3 W. & M. in B. R. Hills v. Mills. Comb. 185. S. C. held accordingly. —Skinn. 299. Mills's caſe. S. C. held accordingly, where he became a bankrupt after his being made executor.——12 Mod. 9. S. C. accordingly.—Nor can the ordinary in ſuch caſe commit adminiſtration to any one. 1 Salk. 299. pl. 11. Mich. 10 W. 3. The King v. Raynes.——3 Salk. 162. pl. 8. S. C.——Carth. 457. S. C. held accordingly; but Ibid. 458. adds, that thoſe concerned for the infants legatees exhibited a bill in Canc. againſt W. the executor, and the Court enjoined him from intermeddling with the aſſets, any further than to ſatisfy the legacy given to himſelf; for in equity he is but a truſtee for the infants; and where a truſtee is inſolvent, the court of Chancery will compel him to give ſecurity before he ſhall enter upon the truſt.

31. An action upon the *caſe* was brought *by an executor for work done*, &c. by his teſtator an *alien*, if the action attached in him before the breaking out of any war between the two nations, and ſo he died before he became an alien enemy, he might have an executor, and the action, though brought by his ſon who is executor, though an alien *en auter droit*, ſhall be maintained. Skin. 370. pl. 18. Mich. 5 W. & M. in B. R. Villa v. Dimock.

32. *Marriage*

32. *Marriage by a mere layman*, and cohabitation, will not intitle the man to adminiſtration to the woman. 1 Salk. 119. pl. 14. 4 Julii, 9 Ann. at the court of delegates in Serjeant's-inn, Fleet-ſtreet. Haydon v. Gould.

S.P. 1 Salk. 36. Mich. 3 W. 3. in caſe of Hills v. Mills

* 24. But if an executor become *non compos*, they may; becauſe it is a natural diſability. 1 Salk. 299. pl. 11. Mich. 10 W. 3. The King v. Raynes.

ſeemed to be agreed. —— Where there is a natural diſability, there is a neceſſity of doing it, but it muſt be ad uſum & commodum of the executor, ſo the granting of adminiſtration becauſe of the executor being a bankrupt is a nullity, & ipſo facto void. 12 Mod. 9 Mich. 3 W. & M. Hill v. Mills.

25. *Popiſh recuſant* convict made his wife, a popiſh recuſant, his executrix, and the ſpiritual court would ſuffer her to prove the will. But a prohibition was granted upon ſtat. Eliz. cap. 4. ſ. 22. [3 Jac. cap. 5.] For ſhe is diſabled by the general clauſe, and not enabled by the proviſo. 6 Mod. 239. Mich. 3 Ann. B. R. Ride v. Ride.

## (U) What Things Executor ſhall have, and not the Heir.

### [Things touching the Realty.]

The reaſon is, becauſe an eſtate tail cannot be of a term. Ibid.

[1. IF *a* deviſe be of land *to one and his heirs of his body for* 500 *years*, this a leaſe for years, and therefore the executor ſhall have it. Co. 10. 87. Loveis's caſe.]

[2. All leaſes for years the executors ſhall have.]

[3. The executors ſhall not have the *deeds which concern the inheritance*, but the heir.]

By Brian and Jenny the heir

[4. And if the *charters are in a cheſt*, the executors ſhall have the cheſt, and the heir the charter. 18 E. 4. 3.]

ſhall have a cheſt of charters of his anceſtor, for the cheſt is of the nature of the charters, but Billing, Choke, and Littleton, contra, for the executors ſhall have them. Br. Charters de Terre, pl. 66. cites S. C. and M. 43 E. 3. 24.

But he ſhall not have execution before ſuch time as the heir has had ſcire facias of the charters. Br. Executor, pl. 139. cites 19 E. 4. 5, 6.

[5. If the *teſtator recovers* in detinue *for deeds in a box*, the executor ſhall have *execution* of this and of *damages and coſts*, and not the heir. 19 E. 4. 6. b. adjudged.]

[6. But if *teſtator recovers a deed in ſpecial*, the heir ſhall have *execution* of it and of *damages, if the deed cannot be had.* 19 E. 4. 6.]

† Fitzh. Detinue, pl. 40. cites S. C. ——

[7. If a *cheſt with charters be incloſed or* [† *faſtened up*, SEALED OR LOCKED] the heir ſhall have the cheſt; but if it be not ‡ incloſed, the executor ſhall have the cheſt. 41 E. 3. 2. 14 H. 4. 30.]

—— ‡ Br. Charters de Terre, pl. 13. cites S. C. —— S. P. Br. Executors, pl. 97. cites 36 H. 6. 26, 27. —— Treſpaſs does not lie of a cheſt with evidence by the heir againſt the executor of his father; for they may

may have the cheſt and retain it, and deliver the evidences to the heir, quære if the cheſt be incloſed. Br. Executor, pl. 145. cites 43 E. 3. 24.

*[8. If a man *delivers a charter* to another, *to redeliver to him and his heirs, having no title to the land*, his heirs ſhall not have this charter, but the executor, becauſe this was but chattel in him without land. 9 H. 6. 58. Curia.] Br. Charters de Terre, pl. 72. cites S. C. —— Fitzh. Detinue, pl. 7. cites S. C.

[9. If a man be *bound to a ſole corporation and ſucceſſor, where the ſucceſſor cannot take*, there the word ſucceſſor is void, and his executor ſhall have it. 20 E. 4. 2.]

[10. Executors and adminiſtrators ſhall have a *rent charge*, villein and ward of body which teſtator had *for years*, as aſſignees in law. D. 3 & 4 Ma. 140. 37.]

[11. The executor ſhall have *relief due to the teſtator*. D. 3 & 4 Ma. 140. 37.]

[12. If a man ſeiſed of a *ward* dies, his executors ſhall have it. 7 H. 4. 43.] Wentw. Off. Executor, 52.

13. In debt it was agreed that where a man *recovers land by real action, or mixt and damages*, and dies, *the* † *heir ſhall have execution of the land*, and the *executor* execution *of the damages*. Br. Executors, pl. 32. cites 43 E. 3. 2. † Orig. is eigne.

14. In treſpaſs, it is a good *plea that J. S. was ſeiſed of the houſe and made him executor, by which he entered and took the cheſt* in the declaration. Per Thorp, the *firſt poſſeſſion of the goods and cheſt is in the executor*, though evidences are in the cheſt, for they cannot know what is in it, till it be opened, and if charters are in the cheſt, the heir may have thereof an action of *detinue*, but *not treſpaſs*, quod Curia conceſſit. Br. Treſpaſs, pl. 326. cites 43 E. 3. 24.

15. K. ſeiſed of land in fee made a *leaſe for years, rendering rent*, and afterwards *deviſed this rent to a ſtranger*, and dies. The *ſtranger is ſeiſed of the rent, and dies*. It was held clearly that the *executors of the ſtranger ſhall have this rent, and not the heir*, becauſe their teſtator had no more than a chattel. D. 5. b. pl. 1. Mich. 26 H. 8.

16. If a *man* be *ſeiſed of an advowſon in groſs, or in fee appendant unto a manor*, and the *advowſon voids*, and *he dies*, his *executor ſhall preſent, and not the heir*, becauſe it was a chattel veſted and ſevered from the manor. F. N. B. 33. (P). F. N. B. 33. (P) in the new notes there (f) cites 21 H. 7. 21. 44 E. 3. 3. 21 H. 6. 9. 33 H. 6. 33. 9 E. 4. 39. —— F. N. B. 33. (P) in the new notes there (g), cites 9 H. 6. 33. 4 E. 3. 2. contra. 39 E. 3. 21. contra, ſed 44 E. 3. accordant.

17. *Leſſee for life of a manor ſeiſes an eſtray*, and dies before the year and day paſſes. Executor of leſſee ſhall have it. Mo. 11. pl. 43. Hill. 4 E 6. Anon.

18. If executor lays a *grave-ſtone on the teſtator* in the church, and ſets up *his coat armour*, and the vicar or *parſon removes them*, or carries them away, an *action on the caſe* lies for the executor or the heir; per Coke Ch. J. Godb. 200. cites 6 E. 6.

19. A

19. A *rent for* 40 *years* was granted to B. with clauſe of diſtreſs, that the *grantee and his heirs might diſtrain* for it during the term. It was ruled that the executor ſhould have the rent, and diſtrain for it, and not the heir. Cro. E. 644. pl. 50. Mich. 40 & 41 Eliz. B. R. Darrel v. Wilſon.

20. *Leaſe to A. and his heirs and aſſigns during his life and one year after.* The executor ſhall have the ſaid term after A.'s death, though the term was not limited to him; per Manwood. 2 Le. 6. pl. 7. 16 Eliz. C. B. in Cranmer's caſe.

[ 146 ] 21. *Leaſe to A. for life, remainder for years to his heirs;* the remainder is in abeyance till A.'s death, and then it ſhall veſt in the heir as a purchaſor and as a chattel, and ſhall go to the executor of the heir, and the leſſee for life cannot meddle with it, for it is not in him; per Dyer Ch. J. 3 Le. 23. pl. 49. Hill. 14 Eliz. C. B. in Cranmer's caſe.

22. If a *term be deviſed to one and the heirs males of his body*, his heirs ſhall not have it, but his executors; for a term is no more than a chattel, nor can it be intailed, and ſuch deviſee may alien the term, if he will, and ſo it was adjudged in PEACOCK'S CASE, 18 Eliz. B. R. and reſolved by Anderſon and Walmſley, 31 Eliz. being referred to them out of Chancery, in caſe of Higgins v. Mills, 10 Rep. 87. a. b. in a nota of the reporter, at the end of Lovies's caſe.

23. The *ſame perſon was heir and executor*, and, as heir and executor, brought a *writ of error* on a judgment in a *quare impedit*, and the judgment was reverſed, but it was not ſaid at whoſe ſuit, viz. whether as heir or executor. Cro. E. 324. pl. 16. Paſch. 36 Eliz. B. R. Pipe v. the Queen.

24. If a man *recovers in qua. imp. and dies*, the queſtion is, who ſhall have the preſentation, whether the heir or the executor? Per Windham J. ſed nemo reſpondit. Goldſb. 55. pl. 8. Trin. 39 Eliz.

25. *Rent-charge to A. for the life of B.* and half a year after, *payable to A. his heirs and executors;* if A. dies, living B. the heirs of A. ſhould have the rent; but if I grant an *annuity for life and* 20 *years after*, theſe are two ſeveral grants, and the executor ſhall have it after the deceaſe of tenant for life. Brownl. 19. Paſch. 17 Jac. Mordant v. Watts.

26. If a man has a *bond*, ſtatute or recognizance *for warranty*, or enjoying of lands, or freeing *or ſaving harmleſs from incumbrances*, in general and particular, and ſells the land, and beſides aſſigning ſuch bond, &c. by letter of attorney to the vendee, makes the *vendee executor quoad the bond, &c.* the vendee, by this being made executor, is better ſecured than by the aſſignment, becauſe now by being made executor, none but he can releaſe or take benefit thereof; but quære if the *vendee, his executors, and aſſigns*, may be made executors, ſo as that ſecurity ſhall go to them one after another without a renewed making of executors. Went. Off. Ex. 12, 13.

27. *Covenant to enjoy lands of inheritance free of certain incumbrances*, if broken in teſtator's life, the action ſeems accrued to the

executor, becauſe teſtator was to recover damages for the breach, and he being to thoſe damages as principal, and not as acceſſory in that action, the law has caſt that action upon the executor. Went. Off. Ex. 65.

28. *After corn reaped, and before the tithe ſet out*, the inheritor of the tithe dies; it ſeems the executor, and not the heir, ſhall have the tithe after ſet out. Went. Off. Ex. 60.

29. If one have a *leaſe for three lives to him and his aſſigns*, this is no chattel, nor ſhall go to the executor nor to the heir, but to him who firſt enters and claims it as an occupant, if no aſſignment be in the life of the leſſee made; contrarily of a leaſe for many years, if three, or more or leſs, ſo long live, this is a chattel, and ſhall go to the executor. Went. Off. Ex. 54, 55.

30. If a *copyholder makes a leaſe for a year*, this is a leaſe by the common law, and not cuſtomary, and ſhall be accounted aſſets in the hands of the executors of the leſſee. Poph. 188. Mich. 2 Car. B. R. Anon.

31. *Grantee of rent in fee takes a leaſe for years* of the lands, out of which, &c. and dies, the executor ſhall have the land, and the heir cannot have the rent, per Hutton J. Litt. 59. Mich. 3 Car. C. B. in caſe of Peyto v. Pemberton. [ 147 ]

32. 3000l. was articled by the huſband after the death of his wife (with whom he had 1500l. and by whom he had two daughters) to be ſecured for the two daughters, by a *purchaſe of lands or leaſes of lands*, and paid to them at their ages of 21 years or marriage. The Court was of opinion, that if the money had been laid out in lands purſuant to the articles, and the children had died before the time of payment, the lands would have gone to the heir, but being in money, would go to the father, and his executors and adminiſtrators. N. Ch. R. 36. 14 Car. 1. Wentworth v. Young. 2 Vern. 284. Hill. 1692. Abbot v. Lee and Cuthbert, S. P.

33. Executor of a *mortgagee* ought to be a party where the heir ſues to have the money paid, or the mortgage foreclоſed. Chan. Caſes, 51. Paſch. 16 Car. 2. Freak v. Hearſey.

34. The *heir of the mortgagee exhibited a bill to have the mortgagor redeem, or elſe be foreclоſed.* The defendant demurred, becauſe the executor, who might have title to the money, was not party; and the demurrer allowed. 2 Freem. 180. pl. 245. 12 May, 16 Car. 2. Freak v. Horſely.

35. The teſtator lent 1400l. to one P. and took a *mortgage of lands to him and his heirs in fee, defeaſanced to pay the ſaid mortgage money to him, his executors, or aſſigns.* This Court declared the mortgage money belonged to the executor, and not to the heir. Chan. Rep. 254. 17 Car. 2. Stanley v. Mandeſley.

36. Grant of rent *in fee, proviſo that grantee retain till ſatisfied* of the profits, the power of entry is an inheritance, and deſcends to the heir; but when entry is made, it is but a chattel intereſt in the land, which ſhall go with the arrears to the executors. 1 Lev. 171. Trin. 17 Car. 2 B. R. Jemot v. Cooley. Sid. 223, 224. pl. 13. Jennet v. Coolley, S. C. and ſaid, that this was only by way of penalty, and therefore ſhould go to the executors as eſtate till ſuch act be done. 1 Saund. 112. S. C. and judgment affirmed in the Exchequer chamber. Raym. 135.

37. A. ſeiſed of land in fee deviſed that *B.* whom he made executor, *ſhould take the rents and profits for* 15 *years in truſt to pay his debts, and upon other truſts*, and after ſeveral particular legacies, bequeaths *all the reſidue of his goods and chattels to B.* Per Cur. the term is in the deviſee, and there paſſed an intereſt, and the *overplus of* the term belongs to the executor. Chan. Caſes, 98. Hill. 18 & 19 Car. 2. Gore v. Blake.

The reporter makes a quere tamen. Ibid. —Chan. Rep. 263. S. C. the Court with the judges were clearly of opinion that the overplus of the rents and profits after debts and legacies paid belonged to *B.* and that ſuch was the intent of the teſtator, and diſmiſſed the plaintiff's bill, who claimed as heir.

38. A. ſeiſed in fee grants *a leaſe to B. for a fine of* 250*l. who mortgaged back the leaſe to C. for the* 250*l. in truſt for A.* this is not a leaſe to attend the inheritance, but ſhall go to the adminiſtrator of A. and not to the heir. Ch. R. 281. 19 Car. 2. Lord Gorge v. Dillington.

39. If the *condition of a mortgage* be *to re-enter upon payment of the money to the executors or adminiſtrators*, there without doubt the heir ſhould not have the money after forfeiture, becauſe the mortgagee looked upon it only as a chattel; though if the word heirs were inſerted in the condition, it would be more a queſtion; by Hale Ch. B. But he ſaid, he took the law to be the ſame in both caſes. Hardr. 467. Trin. 19 Car. 2. in Scacc. in caſe of Pawlett v. the Attorney-General.

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40. If a teſtator *deviſes all his mortgages to the executors*, the executors ſhall have the money due upon them, and not the heir, though forfeited in fee. 3 Chan. Rep. 20. 1667. Owen v. White.

2 Freem. Rep. 126. pl. 144. S. C. decreed accordingly.

41. By the common law, if the *condition* or the *defeazance of a mortgage of inheritance be ſo penned, that no mention is made either of heirs or executors to whom the money ſhall be paid*, in that caſe the money ought to go to the executors, in regard the money came firſt out of the perſonal eſtate, and therefore naturally returns thither again; but if the defeazance appoints the money to be paid either to the heirs or executors, there, by the common law, if the mortgagor pay the money preciſely at the day, he may elect to pay either to the heir or executor. But where the preciſe day is paſt, and the mortgage forfeited, all election is gone, for in law there is no redemption; then when the caſe is reduced to an equity of redemption, that redemption is not to be upon payment to the heir or executor of the mortgagee at the election of the mortgagor, for it were againſt equity to revive the election; for then the mortgagor might defer the payment as long as he pleaſed, and at laſt force a compoſition by payment of the money to that hand which will uſe him beſt; much leſs can the Court elect or direct a payment where they pleaſe; for a power ſo arbitrary might be attended with many inconveniencies; there ought therefore to be a certain rule in this caſe, and a better cannot be choſen than to come as near the rule and reaſon of the common law as may be; now the law always gives the money to the executor where no perſon is named. And where the election to pay either heir

Chan. Caſes, 284, 285, 286. S. C. in totidem verbis.—— Equ. Abr. 326, 327. pl. 2. S. P. cites 1 Chan. Caſes, 283. 2 Chan. Caſes, 50. 57. 220. 2 Vent. 348. 351. 1 Chan. Rep. 183. 1 Chan. Rep. 155. 242. 1 Chan. Caſes, 88. 1 Vern. 170. 412.—— 2 Freem. Rep. 12. pl. 11. Mich. 1726. Ld. C. Finch declared that when upon a mortgage money

heir or executor is gone and forfeited in law, it is all one in equity as if neither heir nor executor were named, and then equity ought to follow the law, and give it to the executor. For in natural juſtice and equity, the principal right to the mortgagee is to the money, and his right to the land is only a ſecurity for the money; wherefore when the ſecurity deſcends to the heir of the mortgagee, attended with an equity of redemption, as ſoon as the mortgagor pays the money, the land belongs to him, and only the money to the mortgagee, which is merely perſonal, and ſo accrues to the executor or adminiſtrator of the mortgagee; and for this reaſon a mortgage of inheritance to a citizen of London hath been held to be part of his perſonal eſtate, and divided according to the cuſtom; and though it may ſeem hard that the heir ſhould be decreed to make a reconveyance without having the money which comes in lieu of the land, it will not ſeem ſo to them who conſider that the land was no more than a ſecurity, and that after payment of the money the law keeps a truſt for the mortgagor, which the heir of the mortgagee is bound to execute. And his Lordſhip declared that the right to a ſum of money, which is a perſonal duty, ought always to be certain, and not to be variable upon circumſtances; wherefore his Lordſhip did not think it material that the adminiſtrator in this caſe had aſſets without this money; for aſſets or not aſſets is not the meaſure of juſtice to executors or adminiſtrators, but ſerves only as a pretence to favour the heir, who either ought to have the money if there be no aſſets, or not to have it if there be aſſets. And for the ſame reaſon his Lordſhip did not think it material, that there wanted the circumſtance of a perſonal covenant from the mortgagor to pay the money; for though the caſe of the adminiſtratrix of the mortgagee had been ſtronger with it, yet it is ſtrong enough without it. And his Lordſhip declared, that he had conſidered the various precedents in this caſe which had been urged, whereof one did not come to the very point, there being a * great difference between a mortgage and an abſolute conveyance, with a collateral agreement to re-convey upon repayment of the purchaſe-money. The other late precedents, which made for the heir, being contrary to the more ancient precedents of this court, and to ſome modern precedents alſo, ſeemed to his Lordſhip of no weight; his Lordſhip being of opinion that all mortgages ought to be looked upon as part of the perſonal eſtate, unleſs the mortgagee in his life-time, or by his will, do otherwiſe declare or diſpoſe of the ſame; and thereupon his Lordſhip decreed accordingly. 2 Freem. Rep. 143, 144, 145. pl. 183. 10 July, 27 Car. 2. Thornborough v. Baker.

is made payable to the heir or executor, there before the day or at the day of payment the mortgagor has election to pay it to which he pleaſes, but that after the day of payment is over and the mortgage forfeited by law, though equity doth give the mortgagor relief ſo as upon the payment of the money, he ſhall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor, but then he ſhall be forced to pay it to the executor, becauſe it came out of the perſonal eſtate of the teſtator, and thither it ſhall return; but if in the mortgage neither heir or executor is mentioned, then after

the death of the mortgagee the law determines it to be paid to the executor. And the money was decreed to the executor.——Ibid. 20. pl. 12. Trin. 1677. S. P. held by Fitzh. C. accordingly upon a demurrer, and cites Littleton's Reaſon. 1 Inſt. 209. b. becauſe the money went out of the mortgagee's perſonal eſtate, and thither it ſhall return. And his Lordſhip took this further rule, that if the money be limited to be paid to the mortgagee, his heirs or executors at ſuch a day, there if the mortgagor dies before the day the party has his election, if he pays it at the day; but if he does not pay it at the day, then it is expreſsly limited to nobody, and this Court gives it conſtantly upon that reaſon to the executors. Rightſon v. Overton.

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Limitation of a term to the heirs males is void and

42. Executor of *iſſue in tail of a term*, ſhall have the term and not the remainder-man. 2 Chan. Caſes, 210. Mich. 27 Car. 2. Warman v. Seaman.

ſhall go to the executors, Ch. R. 11. in caſe of Lydda v. Vanlore. ——It being a limitation by way of eſtate and intereſt, and not by way of truſt. Ibid. ——Though a long leaſe be aſſigned in truſt for J. S. and his heirs, yet it ſhall go to his executors. Agreed, 3 Ch. R. 362. ——N. Ch. R. 153.

2 Chan. Rep. 242. 34 Car. 2. Turner v. Crane, contra.

43. Where upon a *mortgage* payment is made to be to the *heirs, executors, &c.* if the money had been *paid at the day of payment to the heir*, there it was well to the heir. But if it were not paid at *the day*, then it ſhould return to the perſonal eſtate whence it came, and all mortgages pertain to the perſonal eſtate, though made in fee. 2 Chan. Caſes, 221. Mich. 28 Car. 2. Noy v. Ellis.

44. Lands ſettled in fee on *truſt to ſell ſo much as truſtees ſhould think fit*, for payment of debts and legacies, and *the ſurplus to his daughter B. and her executors.* Quære, 1ſt, If the truſtees can ſell more than is ſufficient? 2dly, The daughter being dead without iſſue, whether the lands belong to her adminiſtrator or heir? See Chan. Caſes, 280. Trin. 28 Car. 2. the arguments in the caſe of Popham v. Sir John Hobert.

Vern. 305. Trin. 29 Car. 2. S.C. but it does not appear

45. Though the *mortgagors would not redeem*, yet the land was decreed to the executors againſt the heir. Vern. 413. in pl. 389. cited as the caſe of Noy v. Ellis.

there that mortgagor refuſed to redeem, but that it was forfeited and enjoyed by mortgagee, yet decreed to be perſonal eſtate and to go to the adminiſtrator. ——2 Ch. Caſes, 220. Mich. 28 Car. 2. S. C. decreed accordingly, notwithſtanding the following objections, viz. 1ſt, That the condition was to pay to the heirs. ——S. P. though there were no debts. Arg. 2 Vern. 193. cites it as the caſe of Wood and Thornborough v. Notworthy.

46. *Articles were for a purchaſe*, and *600l. paid*, but intereſt was paid for it by the ſeller till the conveyance executed; and the purchaſor paid rent for the premiſes. Contractor dies before the conveyance made; the executor ſhall have the 600l. as part of the purchaſor's perſonal eſtate. 2 Chan. Rep. 138. 30 Car. 2. Cotton v. Cotton.

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47. *A rent-charge in fee ſubject to a redemption* was deviſed; the mortgage money is paid; decreed the adminiſtrator of deviſee to have it, and not the heir. 2 Chan. Rep. 166. 31 Car. 2. Stewkley v. Henley.

N. B. The deviſe of all his perſonal eſtate (as above) was void, becauſe it was to his executor,

48. A. ſeiſed of a paternal eſtate in A. B. and C. and of *mortgaged lands* in C. D. and E. deviſes all his lands in A. B. and C. *or elſewhere within the dominions*, &c. Then he deviſes all his perſonal eſtate, &c. The money due on the mortgaged lands ſhall go to the adminiſtrator, though the deviſe was to J. S. of all his lands as above. 2 Chancery Caſes, 51. Paſch. 33 Car. 2. Winne v. Littleton.

and he named none, and N. B. The mortgaged lands were in the teſtator's poſſeſſion.

But by Trevor, Commiſſioner,

49. Heir of a mortgagee decreed to *convey* the land *to adminiſtrator of mortgagee*, though the mortgage was forfeited, and the heir

heir was in by deſcent, and no want of aſſets. Chan. Caſes, 50. Hill. 33 Car. 2. Ellis v. Gnavas.

if the mortgagee had been in poſſeſſion and died ſo, he would not have taken the mortgage from the heir, there being no defect of aſſets. Ch. Prec. 11. pl. 9. Trin. 1690. Fiſk v. Fiſk.

But if the heir will pay the mortgage money and intereſt to the executor of mortgagee, he may have the benefit of foreclosure to himſelf. 2 Vern. Rep. 67. Clerkſon v. Boyer. ——— Chan. Caſes, 161. Tilly v. Egerton, contra. ——— 3 Ch. Rep. 63. S. C. ——— S. P. 2 Vern. 67. cites it decreed in caſe of Gobe v. E. of Carliſle.

50. Where lands are *mortgaged* for payment of money, though the mortgage be in *fee-ſimple*, and though the *money* be made *payable* to mortgagee and *his heirs*, yet the money is always accounted part of the perſonal eſtate, and ſhall go *to executors* or adminiſtrators whenever redeemed, and *not to the heir*. 2 Chan. Caſes, 52. Paſch. 33 Car. 2. Wynn v. Littleton.

Vern. 412. Canning v. Hicks. ——— 2 Ch. Caſes, 187. S. C. —Ch. Caſes, 283. Thornborough v. Baker, S. P.

but there the difference is taken between a mortgage and an abſolute conveyance with collateral agreement to reconvey. ——— S. P. Fin. Rep. 305. Trin. 29 Car. 2. Noy v. Bejuſtane. Ibid. 318. Gardner v. Hatton, S. P. ——— And though the lands deſcended to the heir at law, and the money paid to him 10 years ſince, yet upon a bill by the executor of the mortgagee the money was decreed to the executor, but without intereſt. 2 Vent. 348. Trin. 32 Car. 2. Turner's caſe.

51. Where a mortgagee dies and makes no deviſe of the *lands* he has *in mortgage*, they ſhall go to the executor; per Finch C. Vern. 4. Paſch. 33 Car. 2. Winn v. Littleton.

52. *Mortgagee in fee of copyhold*, after failure of payment *was admitted tenant*, and died ſeiſed, and her *heir was admitted, and died ſeiſed*, decreed that the next heir of the mortgagee (there being no debts owing) ſhould have the mortgaged premiſes, and not the adminiſtrator of the mortgagee. 2 Chan. Rep. 242. 34 Car. 2. Turner v. Crane.

Vern. Rep. 170. S. C. but no decree. —S. C. cited Arg. Vern. 412. —Contra, though two deſcents

were caſt, and more due than the value of the eſtate, and the mortgagor by his anſwer refuſed to redeem, and ſubmitted to be foreclosed. Decreed and affirmed on appeal, that it ſhall go to the executor, there being no foreclosure nor releaſe of the redemption. 2 Vern. 367. pl. 329. Mich. 1699. Tabor v. Grover. ——— 2 Freem. Rep. 227. pl. 298. S. C. decreed at the Rolls.

53. *Bond* given by one *parcener* to pay the other, his executors, or adminiſtrators, an *annual ſum* during the life of J. S. for *owelty* of partition, ſhall go to the executors and not to the heir. Vern. 133. Hill. 1682. Hulbert v. Hart.

Becauſe here was no grant of a rent, but only a bare agreement,

and ſo had election either to pay it or forfeit his bond. Ibid.

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54. *Truſtees purchaſed* lands in fee-ſimple *with infant's money*; the infant dies in his minority; this ſhall be accounted part of the perſonal eſtate, and go to his adminiſtrator. 2 Chan. Rep. 377. 1 Jac. 2. Wincheiſea v. Norcliff.

2 Vern. Rep. 353. cites Dennis's caſe, S. P. —Dennis v. Badd, cited

2 Vern. 193. ——— Per Jeffries C. If the truſtees had come here and got a decree for the purchaſe, this Court would have maintained its own decree. Vern. 436. Wincheiſea v. Norcliff. ——— 2 Chan. Rep. 367. 377. S. C. & S. P. decreed accordingly, with the aſſiſtance of the judges ——— 2 Freem. Rep. 95. pl. 105. S. C. ſays, that as to this point the Court was doubtful, but ſeemed to incline that it ſhould go to the heir, and not return to the perſonal eſtate, there appearing no fraud in the truſtees.

55. The executor of a *mortgagee in fee* ſhall have the benefit of ſuch mortgage, viz. the *land*, and not the heir, though the land

be deſcended to him. 2 Chan. Caſes, Mich. 2 Jac. 2. Canning v. Hicks.

56. The queſtion was between the heir and executor of a *freeman of London*, which of them had the right to a *caroone*, viz. the benefit of a licenſe from the ld. mayor and aldermen for the keeping of a cart. Defendant pleaded that the *licence* was a term for years, and a perſonalty, and therefore belonged to him as executor. But the Court over-ruled the plea, and ordered to anſwer the bill. Mich. 1688. per Jefferies C. 2 Vern. 83. Hunt v. Hunt.

Ibid. The reporter adds, that this is now the conſtant practice, having been often ſo decreed ſince that time.

57. A *mortgage in fee was forfeited*, and afterwards the *mortgagee died*. Decreed, that *if there are not aſſets ſufficient to pay the teſtator's debts and legacies, it ſhall go to the executors; but* where there is a perſonal eſtate ſufficient for the purpoſes aforeſaid, it ſhall go to the heir. Nelſ. Ch. Rep. 162. Hill. 1 Will. 3. Anon.

2 Freem. Rep. 209. S. C. cited as held that the executor or adminiſtrator

58. *Committees* of a lunatic inveſt part of his *perſonal eſtate in a purchaſe of lands in fee;* it ſhall be deemed as perſonal eſtate, and decreed an account, and the land to be ſold, and to be divided as perſonal eſtate among the next of kin. 2 Vern. 192. Mich. 1690. Awdly v. Audly.

ſhall have the benefit of the purchaſe and not the heir, becauſe it ſhall not be in the power of a guardian or truſtee to change the nature of the eſtate from a perſonal into a real eſtate of inheritance. —— 2 Freem. Rep. 114. pl. 126. Mich. 1690. S. P. held accordingly.

59. F. had a *mortgage in fee*, which *was forfeited*, and *deviſed all his mortgages to T. whom he made executor*. T. proves the will, and dies inteſtate. W. R. takes out adminiſtration de bonis non to F. and alſo adminiſtration to T. and brought his bill againſt the mortgagor. The heir at law of F. and T. had bought in the equity of redemption. Though there was no defect of aſſets either of F. or T. without this mortgage, yet the mortgage ſhall go to the executor; but Ld. Commiſſioner Trevor ſaid, that *if the mortgagee had been in poſſeſſion, and died ſo*, he would not have taken the mortgage from the heir, there being no defect of aſſets. Chan. Prec. 11. pl. 9. Trin. 1690. Fiſk v. Fiſk.

A copyhold eſtate was granted to A. for the life of A. B. and C. A. dies in-

60. A *copyhold is granted to three ſucceſſively*, but no cuſtom proved that the firſt taker had the power to diſpoſe of the whole, nor that the firſt taker paid the purchaſe-money. This ſhall not go to the executor of the firſt taker, but ſhall go in ſucceſſion. 2 Vern. R. 264. Paſch. 1692. Rundle v. Rundle.

teſtate. His adminiſtrator ſhall have the eſtate during the life of B. and C. Vern. 415. pl. 394. Mich. 1686. Howe v. Howe. —— S. P. per Cowper C. Ch. Prec. 473. Paſch. 1717. Piggot v. Penrice.

[ 152 ] 61. A. has iſſue two ſons, B. and C. and two daughters, M. and N. and by will *deviſed to M. and N.* 550*l. a-piece*, and ordered that it ſhould be *laid out in a purchaſe of lands* by his executors within a year after his deceaſe, *to the uſe of M. and N. and the heirs of their two bodies*, and *if either die before marriage*, then 150*l. part of the portion of her ſo dying*, or if the 1100l. ſhould be laid out in land, then

ſhen ſo much land as ſhould be of the value of 150l. ſhould go *to the ſurviving ſiſter*, and the remaining 400l. or land of that value, if the purchaſe be made, ſhould go to his two ſons, equally to be divided between them and their heirs. M. died unmarried. N. ſurvived, and married J. S. The ſons died without iſſue, and afterwards N. died without iſſue. The money was not laid out in land, but the heir at law claimed the whole 1100l. as land, becauſe, had it been laid out, the land would have deſcended to him. But decreed the 550l. and 150l. to the huſband, the adminiſtrator of N. 2 Vern. 284. Hill. 1692. Abbot v. Lee and Cuthbert.

62. An eſtate pur auter vie, though for lives, whether *freehold or copyhold*, or an office, ſhall *go to the executors* or adminiſtrators, and it had been ſo adjudged as to a prothonotary's office, and the caſes of CHYNNE AND BROMFIELD, CLARK AND DAVIS, HOW AND HOW, were cited, per Cur. 2 Vern. 265. pl. 249. Paſch. 1692. Rundle v. Rundle.

63. Upon an appeal from the Rolls the caſe was, that a *mortgage* was made *of a copyhold eſtate by a ſurrender thereof to one M. P. who was admitted tenant, and died in* 1690. *T. P. her ſon and heir and executor entered, and was alſo admitted, and by his will, but without any ſurrender* to the uſe of his will, *deviſed to the plaintiff, who was alſo adminiſtrator de bonis non to M. P.* The *defendant was heir at law both to M. and T. P.* and would have this to be taken as a real eſtate, being ſo long ſince forfeited, and *two deſcents caſt, and more due than the value of the eſtate*, and *the mortgagors by anſwer refuſing to redeem, and ſubmitting to be foreclоſed*, and the deviſe of T. P. to the plaintiff void at law for want of a ſurrender to the uſe of the will. But decreed at the Rolls to the plaintiff as adminiſtrator de bonis non to M. P. and the decree was affirmed upon the appeal, there being no foreclоſure nor releaſe of the equity of redemption. 2 Vern. 367. pl. 329. Mich. 1699. Tabor v. Grover.

2 Freem. Rep. 227. pl. 298. S.C. and the Maſter of the Rolls decreed the defendant the heir to convey.

64. Where *lands are deviſed to the executors to be ſold for ſeveral purpoſes, and the ſurplus is expreſsly deviſed to them*, there can be no reſulting truſt for the benefit of the heir. Chan. Prec. 94. pl. 83. Paſch. 1699. Dormer v. Bertie.

65. *Mortgagor releaſed to the heir of mortgagee in fee*, the mortgage being forfeited. The adminiſtrator ſhall have the benefit of that eſtate, though there are no debts; Arg. 2 Vern. R. 193. pl. 175. Mich. 1690. in caſe of Audley v. Audley.

66. If *a mortgage be foreclоſed*, or that the mortgage be of ſo *ancient a date* as in the ordinary courſe of the court it is not redeemable, yet if the mortgagee be not actually in poſſeſſion, it ſhall be looked upon to be a perſonal eſtate; Arg. 2 Vern. R. 193. pl. 175. Mich. 1690. in caſe of Audley v. Audley.

67. A. deviſed his lands to truſtees and their heirs, *to divide the profits equally between B. his wife, and C. his daughter, during the wife's life*, and after *to the daughter in tail, remainder over.* The *daughter dies.* This is a tenancy in common between mother and daughter, and during the mother's life the daughter's moiety neither

Ld. Raym. Rep. 721. S. C. held and decreed accordingly. —Wms.'s Rep. 34. pl. 9. S. C. the

Maſter of the Rolls held that B. and C. were jointenants, and that all ſurvived to B.

ther deſcended nor reſulted to the heir, but was an intereſt undiſpoſed of, and * in the nature of a *tenancy pur auter vie*, and belonged to the daughter's adminiſtrator; per the juſtices of C. B. and decreed accordingly. 2 Vern. R. 430. Hill. 1701. Philips v. Philips.

Upon appeal Ld. C. Sommers held, that B. and C. were tenants in common, and that C.'s eſtate determining by her death, the remainder-man or reverſioner had right to that moiety. But Ld. K. Wright, on a re-hearing, was of opinion, that an eſtate by implication did ariſe to B. in C.'s moiety after C.'s death. On a reference to the court of C. B. they conceived that B. and C. were tenants in common, and that C. had an eſtate pur auter vie, which on the ſtatute of frauds (which takes away occupancy) ought to go to C.'s adminiſtratrix, viz. to B. the mother, and that C. had not an eſtate tail in the truſt, for that mergers are odious in equity, and never allowed unleſs for ſpecial reaſons.

Chan. Prec. 71. pl. 142. Kinder v. Milward, S. C. decreed by the Maſter of the Rolls, but that decree reverſed by Ld. K. Wright as contrary to the caſe of Kirk v. Webb.

68. A. dies inteſtate, leaving *a wife and two daughters*. After his deceaſe 400*l. is found hid*. The widow *laid out this money in land*, and ſettles it to herſelf for life, remainder to her two daughters in tail, remainder to her own right heirs. The adminiſtrators of the daughters claimed two thirds as perſonal eſtate, and witneſſes proved that the ſame 400l. was inveſted in this purchaſe. Maſter of the Rolls decreed for the adminiſtrators againſt the heir at law of the widow, but Wright K. reverſed it, this being within the reaſon of KIRK v. WEBB, lately affirmed in parliament, that *money had no ear-mark*, and could not be followed when inveſted in a purchaſe. 2 Vern. 440. pl. 404. Mich. 1702. Kendar v. Milward.

69. The mother, as *guardian to her ſon*, receives rents, and with the money paid off bond-debts, but took aſſignments *of the bonds*. The ſon died an infant, without iſſue. The mother brought her bill againſt the heir to diſcover aſſets by deſcent to ſatisfy the money due by bond, ſhe claiming the rents and profits as *adminiſtratrix to her ſon*. Per Cur. the guardian is not compellable to apply the profits of the eſtate deſcended on the infant heir to pay off the bond-debts of his anceſtor. 2 Vern. 606. pl. 544. Hill. 1707. Waters v. Ebrall.

70. An *annuity* is the only perſonal intereſt that can be thought of which is deſcendible to the heir; Arg. 10 Mod. 237. Paſch. 13 Ann. in caſe of Roper v. Radcliffe.

71. *Deviſe of lands to an executor in truſt*, and to the intent *that the ſame, or ſo much thereof as ſhould be needful, ſhall be ſold for payment of debts and legacies*. This is a beneficial legacy to the executor, and not a reſulting truſt to the heir, and parol evidence being admitted. Feb. 15th, 1710. Dockſey v. Dockſey.

71. A *term conveyed as a fee* by leaſe and releaſe to J. S. and his heirs, by the word grant, &c. though it cannot operate as a fee to go to the heirs of J. S. yet ſhall go to his executors and adminiſtrators; per Ld. Cowper. Chan. Prec. 480. Hill. 1717. Marſhall v. Frank.

Where the father is bound to his eldeſt ſon and dies, the aſſets deſcend to the ſon, yet he ſhall have ſatisfaction of the executors. Per Ld. Cowper. Gilb. Equ. Rep. 65.

72. An executor has not the ſame right to the perſonal eſtate as the heir at law has to the lands, becauſe *an executor is no more than a truſtee* made by the teſtator, but an heir is to ſit in the ſeat of his anceſtors; per Cur. 8 Mod. 126. Paſch. 9 Geo. Goodright v. Opie.

73. A queſtion was, whether *law manuſcripts* are part of the perſonal eſtate, or ſhall go to the heir? but the Court decided nothing in this affair, becauſe all conſented to have them printed under the direction of the Court, without making any profit of them. 10 Mod. 530. Mich. 10 Geo. Atcherley v. Vernon.

74. *A granary built on pillars* in Hampſhire is a chattel, and [ 154 ] goes to the executors, and may be recovered in trover. This ſhall be underſtood according to the cuſtom of the county; coram Eyre Ch. B. Summer aſſizes, 1724. apud Wincheſter.

75. One *deviſes lands to truſtees* in fee, in truſt *to apply the profits until ſale for the benefit of his four children, and the ſurvivors*, and ſurvivor of them equally; *and on further truſt, that as ſoon as the truſtees ſhall ſee neceſſary, for the benefit of the children, they ſhould ſell the premiſes, and apply the money for the benefit of his four children, equally to be paid at* 21, *or marriage. A. the eldeſt of the four children attained* 21, *and married, and died without iſſue inteſtate*, leaving a wife. Decreed, the land being in all events deviſed to be ſold, though the time for ſale was left to the executors, was perſonal eſtate, and *A.'s widow muſt have a moiety of A.'s ſhare, and the profits of the land until ſale muſt go as the money ariſing upon the ſale would.* 2 Wms.'s Rep. 320. pl. 92. Hill. 1725. Doughty v. Bull.

76. Mr. Savil, of Midley, in the county of York, *ſettles lands* of 4000l. per ann. *upon his marriage* with Mrs. Banks, *upon the firſt and every other ſon of that marriage, in tail ſucceſſively*, as uſual in marriage ſettlements, and *dies, leaving iſſue one ſon and one daughter, both infants*, and their mother their guardian. The ſon, about the age of 20 years, fell into a conſumption, and about five months after was given over by his phyſicians, as paſt hopes of recovery, and not likely to live to the age of 21 years. The defendant, his mother and *guardian, about two months before his death*, which happened at his age of 20 years and 7 months, *gives order for felling a great quantity of timber without her ſon's privity* or conſent, and in that ſpace did fell timber *to the value of* 5000*l. or* 6000*l.* in an improper ſeaſon of the year, and in a waſteful manner, *in order to increaſe her ſon's perſonal eſtate, which was divided at his death between her and her daughter*, as next a-kin by the ſtatute of diſtributions. The *bill was brought by plaintiff as next in remainder againſt the defendant Mrs. Savil and her daughter, to have an account* and ſatisfaction for the money raiſed by the ſale of this timber, upon the foot of fraud, that the mother felled this timber without the privity and conſent of her ſon, in prejudice to the remainderman and his inheritance. King C. was of opinion, there was no relief in equity in this caſe; for this was a court of equity, but not of honour, that the infant, being tenant in tail, had a right to the timber growing upon his inheritance, and when ſevered from the ſoil became a chattel intereſt in him, and conſequently would go to his repreſentatives, and the felling the trees without his order or direction makes no alteration in the caſe, be it done by a tort-feaſor or treſpaſſor, or by tenant in tail himſelf, the law is the ſame. Bill diſmiſſed quoad hoc. MS. Rep. July 8, 1727. Savil v. Savil.

77. Peti-

77. Petition by Sir R. Raymond Ch. J. and Edward Ventris, Eſq. adminiſtrator with the will annexed of the late Ld. Ch. J. Holt, and truſtees appointed by the Court to execute the truſts of the will, the executors and truſtees appointed by the will having renounced the truſt, for the directions of the Court upon this caſe. By the decree, the reſidue of the teſtator's *perſonal eſtate was to be laid out in the purchaſe of land, to be ſettled* according to the directions in the will, *and until proper purchaſes could be made, the money was to be put out* in government or other ſecurities, with the approbation of the maſter, *and the intereſt* of the money was *to be paid to the truſtees, to be accounted for by them to ſuch perſons as ſhould ſucceſſively be entitled to the rents of the lands when purchaſed* according
[ 155 ] to the will, &c. Part of the truſt-money was inveſted in South-Sea annuities. *Mr. John Holt, being tenant for life* (with *remainder to his brother, Mr. Rowland Holt*), *died 2d January*, 1728. Lady Jane Holt, *his widow and adminiſtratrix, claims an apportionment of the half year's dividend*, or annuity due, and *paid at the Lady-day next after her huſband's death, as intereſt due to him at the day of his death.* On the other hand, Mr. Rowland Holt, as next in remainder, inſiſts, that in regard his brother, Mr. John Holt, the tenant for life, died before Lady-day 1729, when the half-year's dividend or annuity became due and payable; that he, as next in remainder, is entitled to the whole dividend, as he would have been to the whole half year's rent, if the money had been laid out in land. It was *ordered, that the ſaid half year's dividend ſhould be apportioned by the truſtees*, and that ſo much thereof as by computation was due to Mr. John Holt, at the day of his death, ſhould be paid to Lady Jane, his adminiſtratrix, and the reſidue to Mr. Rowland Holt, the next in remainder, for that theſe annuities are in the nature of intereſt, which, though payable but half yearly, as intereſt is often reſerved on mortgages and other ſecurities, yet where intereſt is given for life, it is always computed to the day of the death of the tenant for life, or to the day of paying off the principal. But as to another *claim* of Lady Jane Holt, *as adminiſtratrix to her huſband, as to the growing intereſt of 6000l. S. S. annuities, which were ſold by the truſtees, 12th Auguſt* 1727, *in order to raiſe money for a purchaſe, from the Lady-day next before ſuch ſale*, the Court was of opinion, that ſhe was not intitled to any allowance for intereſt of that ſum, though the truſtees having purchaſed the ſame in the middle of the half year, when three months intereſt had incurred upon them, and Mr. John Holt had made an allowance for ſo much intereſt as was incurred at the time of the purchaſe out of his eſtate for life, and the ſums ſo deducted by the truſtees out of the next dividend was added to the principal truſt-money, yet *the Court would not make her any allowance for the intereſt incurred from Lady-day* 1727, *to Auguſt* 12 *following, when the annuities were ſold, becauſe they being ſold to make a purchaſe of land*, Mr. John Holt, *the tenant for life, would be intitled to the growing half year's rent* at Michaelmas *in lieu of intereſt, and ought not to have both*; per Jekyll Maſter of the Rolls. MS. Rep. Hill. Vac. 3 Geo. 2. at the Rolls, ex parte Raymond Ch. J. and Mr. Ventris.

78. One

78. One poſſeſſed of a term for years deviſed it *to A. for life*, remainder *to the heirs of A.* It ſeems that this ſhall, on A.'s death, go to his executor, and not to his heir. 3 Wms.'s Rep. 29. Hill. Vac. 1729. Davis v. Gibbs.

79. An *executor in truſt for an infant of a leaſe for 99 years, determinable on three lives, on the lord's refuſing to renew but for lives abſolutely, complies with the lord, and changes the years into lives.* On the *infant's dying under 21 and inteſtate*, this ſhall be a truſt for his adminiſtrator, and not for his heir. 3 Wms.'s Rep. 99. Hill. Vac. 1730. Witter v. Witter.

80. A deviſe in the following words, *As to my temporal eſtate I bequeath to my nephew T. (the teſtator's heir at law) 50l.* then, *after ſeveral legacies, ſays, and all the reſt and reſidue of my eſtate, goods, and chattels whatſoever, I give and bequeath to my loving wife M. C. whom I make my full and ſole executrix.* This is a deviſe of the fee-ſimple eſtate of the teſtator. Caſes in Equ. in Ld. Talbot's Time, 284. Trin. 7 Geo. 2. Tanner v. Morſe.

81. The teſtator T. M. by his laſt will deviſed as follows: Imprimis, *I deviſe*, give, and bequeath, *all and ſingular my meſſuages, lands*, and hereditaments whatſoever, and whereſoever, in the counties of Norfolk, Suffolk, and Cambridge, *unto my ſiſter E. M. and to her heirs and aſſigns for ever, upon truſt, that the ſame ſhall be* [156] *ſold by her or them, for the beſt price that can be gotten for the ſame*, as ſoon as conveniently can be after my deceaſe; *and that out of the monies* ariſing therefrom, *all my juſt debts*, of what kind ſoever, *be paid; and after payment of my debts I deviſe, out of the remainder of money, the ſum of 500l. to my ſiſter Mary Bainbrigg, and alſo 500l. to my ſiſter Girt's children that ſhall be living at the time of my deceaſe, to be divided equally between them;* and alſo 500l. to my nephew Nicholas Mallabar, his heir at law; and alſo 500l. to be divided amongſt the children of my late brother James Mallabar, which ſhall be living at my deceaſe. *Item, after my debts and legacies paid as aforeſaid, and ſubject to the ſame, I give and bequeath all the reſt and reſidue of my perſonal eſtate unto my ſiſter E. M. whom I do hereby conſtitute and appoint ſole executrix* of this my laſt will and teſtament. The plaintiff's counſel inſiſted, that here could be no reſulting truſt for the heir; 1ſt, Becauſe the teſtator had given a legacy of 500l. to the heir. 2dly, Becauſe the teſtator had directed his real eſtate to be ſold for payment of his debts and legacies, and had therefore conſidered it as a perſonal eſtate, and after payment of his debts and legacies, and ſubject to the ſame, had given all the reſt and reſidue of his perſonal eſtate to his executrix the plaintiff; but if it ſhould be conſtrued to be a reſulting truſt for the heir, the teſtator's intent would be utterly defeated; for then the perſonal eſtate muſt be applied in eaſe of the real, and ſo the executrix would have but a troubleſome affair, without any benefit or conſideration, which could never be the teſtator's intent; and in order to ſhew clearly that was the teſtator's intent, it was inſiſted upon giving parol evidence. Ld. Chancellor decreed, that upon the will itſelf, independently of the parol evidence, here was no reſulting truſt for the heir, and that the executrix ſhould have the whole reſidue, after the ſale of the eſtate,

eſtate, both of the money ariſing by ſuch ſale, and of the perſonal eſtate. Caſes in Equ. in Ld. Talbot's Time, 79, 80. Paſch. 1735. Maillabar v. Maillabar.

## (X) What Things they ſhall have as Aſſignee.

[1. IF deviſee be of a *legacy to one and his aſſigns*, and deviſee dies before payment, the adminiſtrator ſhall have it as aſſignee. Hill. 14 Jac. B. R. per Cur.]

See tit. Condition * Fol. 916. (H. a) pl. 2. and the notes there. —2 Vern. 181. Arg. cites Hob. 9. pl. 19. S. C.

[2. If the condition of an *obligation be, that* if the obligor *pay* 20*l. to ſuch a perſon as the obligee, by his laſt will in writing, ſhall appoint* * *it to be paid*, then the obligation to be void; if the obligee *appoints no perſon* to whom it ſhall be paid, *but makes his laſt will, and* makes *executors* thereby, yet the 20*l.* ſhall not be paid to the executors; for here it appears that this was to have been paid *to an aſſignee in deed, to be made by the obligee by his appointment*, and not to an *aſſignee in law*, Hob. 14. per Curiam. PEASE AGAINST STILEMAN.]

3. If a man be *bound to deliver a true rental, &c. to J. N. or his aſſignee at the end of* 20 *years*, and he makes an executor and dies [157] before the end of 20 years, there the obligor is bound to deliver a true rental to the executor; for he is aſſignee in law; quod nota; per Engleſield, Shelly, and Willoughby. Br. Deputy, pl. 1. cites 27 H. 8. 2.

4. *A. made a leaſe to B. for life by indenture*, in which was a *proviſo*, that *if* the *leſſee died before the end of* 60 *years* then next enſuing, that *his executor ſhould have and enjoy, as in the right and title of the leſſee, for* term of *ſo many of the years* as *amounted to* the whole number of 60, ſo that the commencement of the ſaid 60 ſhall be accounted from the date of the ſaid indenture. The leſſee made two executors, and died. One of them entered into the land. And the opinion of the Court was, that no leaſe for years was made by this proviſo in the leſſee, nor by remainder in his executor, becauſe nothing of the ſaid term was limited to the leſſee for life as remainder to him and his executors. And. 19. pl. 38. Trin. 3 & 4 P. & M. Gravenor v. Parker.

5. A *leaſe for years* was made thus, viz. This indenture *between T. of the one part, and F. his wife and their children lawfully begotten at the aſſignment of the ſaid F. of the other part.* The queſtion was, if Lucy, the daughter which the huſband and wife had at that time, was a party to this indenture, and ſo took the term? or if another ſon of F. whom he afterwards made executor, ſhould have it? Wray J. conceived that by thoſe words, viz. (at the aſſignment of F.) he had reſerved a liberty to make his ſon a party, and becauſe he had not aſſigned him, that he took nothing. The opinion of the whole Court was, that *the defendant, who claimed by the executor, ſhould have the term, and not the plaintiff, who claimed by the daughter;* and judgment accordingly. 4 Le. 64. pl. 158. Trin. 27 Eliz. B. R. Trecarram v. Friendſhip.

6. One

6. One was bound to ſtand to the award of two arbitrators, who *award that the party ſhall pay unto a ſtranger, or his aſſigns, 200l. before ſuch a day.* The *ſtranger before the day dies*, and *B. takes letters of adminiſtration.* It was the opinion of the whole Court, that the money ſhould be paid to *the adminiſtrator*, for he *is aſſignee*; and by Gawdy J. if the word (aſſignee) had been left out, yet the payment ought to be made to the adminiſtrator; quod Coke affirmavit. Le. 316. pl. 443. Paſch. 30 Eliz. B. R. Anon.

7. In trover where the defendant juſtified, for that one J. W. was ſeiſed in fee of land in D. and *granted a rent-charge during the life of M. wife of A. which A. died inteſtate, and M. was his adminiſtratrix, and the defendant, as ſervant, took a diſtreſs in the ſaid land* for the ſaid rent by command of M. and impounded them there, *and traverſes the taking in any other place*; it was held ill upon demurrer; for the inducement is not ſufficient cauſe of juſtification for taking the diſtreſs, becauſe this rent was determined by the death of A. by reaſon *there cannot be an occupant of rent*, and M. is not aſſignee by the taking adminiſtration. For none can make a title to rent to have it againſt the tertenant, unleſs he be party to the deed, or conveys a ſufficient title under it; and ſo judgment was for the plaintiff. Cro. E. 901. 44 & 45 Eliz. B. R. Salter v. Butler. Noy, 46. S. C. adjudged.—Mo. 664. pl. 907. S. C. adjudged.—Yelv. 9. S. C. adjudged.

8. An adminiſtrator cannot take by the word *aſſigns*, as an aſſignee, becauſe he comes in by the ordinary, who is a ſtranger; but it is otherwiſe of an executor, for he comes in by the act of the party; and ſo a huſband comes in for his wife. Per three juſtices. Ow. 125. Mich. 41 & 42 Eliz. C. B. in caſe of Sparke v. Sparke.

9. Executor of leſſee for years is not in as aſſignee, and therefore in debt brought againſt him for the rent, if he pleads that he refuſed the term, judgment will be againſt him; whereas if he was in as aſſignee, he might avoid and waive the *term*, but here *he is in in privity of contract.* Lat. 261. Arg. cites Hill. 15 Jac. C. B. Heydon and Hudſon, and Paſch. 17 Jac. B. R. Manly v. Moody, that he *cannot refuſe the term.* [158]

10. If A. *covenants to* make a *leaſe to J. S. and his aſſigns by Chriſtmas*, and J. S. dies before that time, and before the leaſe made; the leaſe muſt be made to his executors, as his aſſigns repreſenting his perſon. Went. Off. Ex. 100.

11. *Condition to pay feoffor or his aſſignee*; the payment muſt be made to the executor. Went. Off. Ex. 100.

12. *Leaſe to A. and his aſſigns during the life of B.* ſhall not go to the executors of A. Went. Off. Ex. 100.

13. Grant of the *cuſtody of an ideot* paſſes an intereſt to the executor of the grantee. For the king has the ſame intereſt in an ideot that he had in his ward, which always went to the executor of the grantee; but it was otherwiſe of a lunatic. 3 Mod. 43. Paſch. 36 Car. 2. B. R. Prodgers v. Frazier. Vern. 9. pl. 7. Mich. 33 Car. 2. Ld. Chancellor inclined that it could not be granted to a man, his executors, adminiſtrators and aſſigns, and that there was no precedent of any ſuch grant, and that what never was, never ought to be.——Ibid. 137. pl. 129. Hill. 1682. S. C. Ld. K. North refuſed to do any thing in it till the validity of the patent was determined in a legal trial, and therefore directed the plaintiff to bring his ejectment cuſtodiæ to be tried in B. R. the next term, and

and the defendant to admit that the plaintiff was once in poſſeſſion.——2 Chan. Caſes, 70. S. C. Mich. 33 Car. 2. Ld. Chancellor thought the caſe of an ideot and a ward are not alike.

14. Upon a fine the *uſe of lands was limited to A. for* 80 *years, with a power to A. and his aſſigns to make leaſes for three lives, to commence after the determination of the ſaid term. A. aſſigns over to B. B. died, and makes C. his executor, who aſſigns over to D. who made the leaſe for life, which was the eſtate in queſtion.*- And the *queſtion was, whether* or no *D. was ſuch an aſſignee of A. as had power to make this leaſe,* or whether it ſhould extend only to the immediate aſſignees of A. And the doubt in this caſe was the greater, becauſe here was a deſcent upon an executor, who made the eſtate over to him who made the leaſe; and the caſe in Hob. 11. PEASE v. STYLEMAN was cited, where an executor or an adminiſtrator in ſome caſes ſhall not be ſaid to be a ſpecial aſſignee. But all the Court ſeemed to incline to the contrary; and that *D. ſhall be ſaid an aſſignee well enough to this purpoſe; and ſo ſhall any perſon that comes to the eſtate under the firſt leſſee, though there be* 20 *mean aſſignments.* And afterwards in Michaelmas term following judgment was given accordingly. Freem. Rep. 476, 477. Trin. 1679. pl. 654. How v. Whitebank.

15. Leſſor covenants *to build a new houſe* for leſſee and his aſſigns; executor is aſſignee. Lat. 261. Hill. 3 Car. Iremonger v. Newſam.

2 Chan. Rep. 374. S. P. Per Curiam in S. C.

16. Where a *perſon intitled to a ſhare of inteſtate's eſtate dies before diſtribution, and within the year,* there is an intereſt veſted, and *his ſhare ſhall go to his executor* or adminiſtrator. Per Cur. Vern. 403. Trin. 2 Jac. 2. in caſe of E. of Winchelſea v. Norcliff.

1 Salk. 309. pl. 13. S.C. adjudged niſi.—— Ld. Raym. Rep. 353. S. C. held accordingly.

17. *Adminiſtrator* of aſſignee of a term was ſued as aſſignee, and not as adminiſtrator of aſſignee of leſſee, and held good. Carth. 519. Paſch. 12 W. 3. B. R. Tilney v. Norris.

18. Defendant did *covenant to ſerve* the plaintiff's *teſtator and his aſſigns for eight years,* and the queſtion was, whether the plaintiff as executor was aſſignee in law? for by the agreement it is not fixed to the perſon of the teſtator, for if it were, the executor ſhould have it, and it would be aſſets in his hands. See Plowd. 287. b. 288. a. And it was ſaid, that if the executor did ſet up ſuch a
[ 159 ] trade as the ſervant was to be employed in by the covenant, it ought not to determine by death of covenantee. Secus it were hard to transfer the ſervant to another ſervice, and ſo it was ſaid it would be in caſe of an apprentice, and here it being *averred the plaintiff uſed the ſame trade* in which the defendant had covenanted to ſerve, he had judgment. 12 Mod. 650. Hill. 13 W. 3. Jackſon v. Bridge.

## (Y) What Things ſhall go to the Executor or Adminiſtrator.

### [In reſpect of the Limitation.]

[1. IF a man poſſeſſed of a *leaſe for years deviſes* the benefit of it to A. his wife for ſix years, and *that J. my ſon, if he come home, ſhall have the reſidue of the term, and if he do not then come home within ſix years, then W. my ſon ſhall have it until J. does come home*, and dies, and after *W. dies within the ſix years*, and after *J. does not come within the ſix years*. Though this was but a poſſibility to have the term, ſcilicet, if J. does not come within the years, and W. dies before that the poſſibility happens, yet his executor ſhall have it. For *this was a poſſibility fixed* in the teſtator, and only to be perfected by the act of God, without any act of the parties. For this is not like to a leaſe to be named by J. S. For there is not any perfection before the naming. Adjudged upon a ſpecial verdict. Mich. 16 Jac. B. R. SHREEVES v. WROTTAM.] Cro. J. 509. pl. 21. Sheriff v. Wrotham. S. C.

[2. So if a *termor deviſes* his term *to one, and the heirs males of his body, and that if he dies without iſſue male to J. S.* and *J. S. dies in the life of the firſt deviſee*, yet the poſſibility that he had to have the term by the deviſe ſhall go to his executor for the cauſe aforeſaid. Contra. Trin. 8 Ja. B. R. Rot. 439. Adjudged. PRICE v. ATMORE.] Termor for 40 years deviſed to B. if he ſhould ſo long live, remainder to C. and the heirs of his body. C. died, living B. then B. died. The Court held that the executor of C. could not enter; becauſe C. had only a poſſibility and no intereſt. Mo. 831. pl. 1118. Trin. 10 Jac. B. R. Price v. Almory.——4 Le. 246. pl. 401. Price v. Atmore. S. C. ſtates it that he made his wife executrix, and deviſed all his term and intereſt to her, and that if ſhe died before the term ended it ſhould remain to C. his ſon, and the heirs male of his body. C. died. The wife entered and claimed as legatee, and aſſigned the term over. The executor of C. entered; but agreed that his entry was not lawful; for C. had only a poſſibility, but no intereſt, and the whole term was in the wife.——Bulſt. 191. S. C. And Ibid. 194. per tot. Cur. the executor of C. ſhould not have this poſſibility, in regard that C. who had the remainder died before the ſame happened, and was attached in him; and judgment accordingly.——S. C. cited Cro. J. 510. in caſe of Sheriff v. Wrotham, as adjudged that ſuch a poſſibility of a term ſhall not go to an executor or adminiſtrator, but the Court held it not to be law, but conceived the reſolution in Lampet's caſe, 10 Rep. 51. to be good law in this point.——Sid. 188. in a nota at the end of the caſe of Cookes v. Bellamy ſays, that S. C. was cited as adjudged, that by the death of him in remainder, living the tenant for life, the remainder is deſtroyed, it being contingent, and that in this caſe Twiſden J. ſaid, that Lampet's caſe, Co. 10. was denied,

* [ 160 ]

[3. If a man *leaſes* land to another *for* 80 *years if he ſo long live*, and if he dies within the term, that then immediately after his death the land *ſhall remain to his executors for* 21 *years*, and after the leſſee dies inteſtate, yet his *adminiſtrator ſhall have the term* for 21 years. For the adminiſtrator is within the intent * of the grant. Tr. 43 El. B. R. between SPARK AND SPARK, admitted.] An adminiſtrator ſhall not have a thing limited in purchaſe to an executor; as he ſhall not enter for a condition, nor ſhall have rent nor benefit of an exception appointed to an executor. Mo. 666. pl. 911. Mich. 44 & 45 Eliz. Sparke v. Sparke,

In this caſe the leſſee made leaſe for 21 years and died inteſtate, and the adminiſtrator brought debt againſt the aſſignee of the term for the rent, but adjudged that the action did not lie, becauſe the executors

cutors and aſſigns are to take by purchaſe the term for 21 years, and the term was never in the inteſtate himſelf to grant or diſpoſe, and there is no executor to take, and no aſſignee can take. Ibid.——— Cro. E. 840. S. C. adjornatur.———Yelv. 9. S. C. but not adjudged.——Ow. 125. S. C. adjudged that the adminiſtrator ſhould hold the term as a thing veſted in the executor.

[4. If A. leſſee for years of a ſmith's ſhop aſſigns it to B. and *covenants with B. not to ſell wheels for coaches to the prejudice of A. or his aſſigns*, and after A. dies, and *adminiſtration is granted to his wife, who continues the trade in the ſhop*, if B. after ſells wheels for coaches to the prejudice of the adminiſtratrix he breaks his covenant, for the *adminiſtratrix is an aſſignee* to have benefit of this covenant. Mich. 9 Car. B. R. adjudged upon a demurrer. HILL v. HAWES. Intratur Tr. 9 Car. Rot. 1394.]

5. It was agreed that if a man *leaſes land for term of life*, the *remainder over in tail*, the *remainder in fee to the tenant for life*, and the *tenant for life did waſt*, and he in remainder *in tail brought action of* waſt, *and recovered and died without iſſue before execution*, his executors ſhall have execution of the damages by reaſon of the judgment, and yet now the fee is veſted in the firſt tenant; for the damages were veſted by the judgment. Br. Damages, pl. 177. cites 50 E. 3. 3.

6. Tenant in *dower* makes *leaſe for years* reſerving rent, and takes baron, the rent was arrear; baron dies. Per tot. Cur. his executors ſhall have the *rent*. Mo. 7. pl. 25. Mich. 3 E. 6. Anon.

S. P. per Cur. obiter, Carth. 52. Trin 1 W. & M. in B. R.——Poph. 11. Hill. 35. Eliz. in caſe of Ward v. Downing.

7. Where a ſum of *money* is *bequeathed to T. S. to* be paid when he is *at the age of* 21 *years*, and *he dies before the time, his executors ſhall have the legacy*, and ſhall ſue for it *preſently*, and not expect to the time when the infant, had he continued alive, ſhould have been 21. And Dr. Awbrey, who came into court to inform the juſtices what the civil law was, declared it to be ſo. Le. 278. in pl. 376. Hill. 26 Eliz. B. R. in Lady Lodge's caſe.

8. A. deviſed lands to his wife for life, then to B. his ſon and his heirs *when he comes to* 24, *and if his wife dies before B. attain* 24, *then J. S. ſhould have it till the ſaid age of B.* A. died. J. S. died. His wife died. B. was within 24. Per two juſtices, the executor of J. S. ſhall not have the land till the age of B. becauſe but a *poſſibility* which never veſted in J. S. 3 Le. 195. pl. 244. Hill. 29 Eliz. C. B. Anon.

9. G. *deviſed a houſe to R. and J. for the term of* 21 *years to commence after the death of M. and if R. and J. die in her life-time, or* afterwards, and *before the term of* 21 *years expired after the death of M. then he deviſed the reſidue of the ſaid term to K. in the ſame manner as* he had deviſed it *before to R. and J. and immediately after the death of M. and the expiration of the ſaid* 21 *years of R. and J. or of K. if ſhe ſurvive, that the ſaid meſſuage ſhould be and remain to W. R.* The ſaid *R. and J. died within the* 21 *years, K. ſurvived, but died, before the* 21 *years expired, inteſtate*; the queſtion was, if her adminiſtrator ſhall have the reſidue of the term of 21 years. The Court agreed that the term determined by her death, for ſhe could

could not have it during the lives of R. and J. and ſhe could not have it for 21 years abſolutely, * becauſe it was deviſed to her in the ſame manner as to R. and J. and that was, if they ſo long live, and ſo Katharine was to have it if ſhe ſhould ſo long live. 2 And. 17. pl. 11. Henning v. Blake.

10. Adminiſtrator is capable of a *poſſibility*. Adjudged. Mo. 483. Mich. 40 & 41 Eliz. in caſe of Lloyd v. Wilkinſon.

11. A man ſeiſed of wood *granted* 100 *cords of wood to be taken by the aſſignment of grantor*. By the better opinion no property was veſted in the grantee before the aſſignment, and if the *grantor dies before aſſignment*, the grant is void, and his executors, if he dies, ſhall not have it. Goldſb. 184. pl. 123. Hill. 43 Eliz. Anon.

12. If a man *covenants to ſtand ſeiſed to the uſe of himſelf for life*, the *remainder to the uſe of his executors*; in that caſe the executors ſhall take to the uſe of their teſtator; *but* if a man *covenants upon good conſideration to ſtand ſeiſed to the uſe of the executors of a ſtranger*, the word executors is a word of purchaſe, and they ſhall take to their own uſe. 4 Le. 239. pl. 387. The opinion of Popham Ch. J. in B. R. Mich. 6 Jac. Anon.

13. *Bond by A.* to B.—Condition *to pay* 10*l. to ſuch as B. ſhould name by his will.* B. made a will and executors, but named no certain perſon to take the 10l. The executors ſhall not have the 10l. Godb. 192. pl. 274. Trin. 10 Jac. C. B. Mead's caſe.

Bond to pay 20 l. to B. when he ſhall be out of his apprenticeſhip.

B. died before his apprenticeſhip was out, the executors ſhall not have the money, otherwiſe if the bond had been to pay 20 l. after the expiration of ten years, adjudged. Godb. 153. pl. 199. Mich. 5 Jac. B. R. Anon.

14. A is *bound to pay* 10*l. to the aſſignee of B.* the obligee. B.'s aſſignee makes executor, and dies; executor ſhall not have the 10l. But if A is bound to pay 10l. to B. or his aſſignee, there the executor ſhall have it, becauſe it was a duty in the obligee himſelf. Godb. 192. pl. 274. Trin. 10 Jac. C. B. in Mead's caſe, per Coke Ch. J.

15. Deviſe of a term to A. for life, remainder *to B. and M. his wife, if they have not iſſue male, and if it ſhall pleaſe God to ſend them iſſue male, then to be reſerved and put out for the benefit of ſuch ſons or one of them.* Teſtator dies; A. enters as legatee, and dies, B. and M. then not having iſſue male, but after they have, B. dies. The iſſue male, whenever born, ſhall have the term, and adjudged for the iſſue male againſt M. the mother. Mo. 846. pl. 1146. Hill. 13 Jac. Blandford v. Blandford.

Roll. Rep. 321. S. C. and if that iſſue had died it ſhould go to his adminiſtrator, and if another had afterwards

been born he ſhould deveſt it from the adminiſtrator, and if more ſons ſhould after be born they ſhould take jointly with him.

16. If one by deed or writing, or by *word on his death-bed or before, gives goods, and dies before donee takes them*, yet he may take them. Went. Off. Executor, 26, 27.

17. *Things feræ naturæ reduced* to tameneſs, *or confined*, ſo young pigeons, though not tame, being in the dove-houſe, not able to fly, reclaimed hawks, becauſe commonly *vendible*, ſo *hounds, greyhounds, ſpaniels, maſtiffs, ferrets*, ſhall go to the executor. Went.

Off. Executor, 57, 58. and ſays, that in replevin the word *averia* may be applied to theſe.

18. The perſonal eſtate was deviſed to *raiſe money and purchaſe* land for A.—A. dies without iſſue, the land not purchaſed; decreed, the adminiſtrator of A. ſhall have the money out of the hands of the executor. Ch. Rep. 204. 13 Car. 2. Wood v. Caley.

[ 162 ] 19. *Lands conveyed to truſtees* for 99 years to raiſe 1000l. a piece to A. B. and C. his children as ſhould be then unmarried, or not provided for after they ſhall attain 21 years. A. was 21, and married before the ſettlement, and had an allowance during his life of 30l. per annum; A. died; the father died; the 1000l. ſhall go to the deviſee and executor of A. Ch. Rep. 258. 17 Car. 2. Corbet v. Morris.

20. Deviſe of *money to be paid at a future day*; deviſee dies before the day, yet it is payable to the adminiſtrator. 2 Ch. Rep. 25. 21 Car. 2. Rowley v. Lancaſter.

Cited per North K. Vern. 304. 21. Where the truſt of a term is to A. for life, remainder to B. for life, remainder *to C. (if he outlive A.)* remainder to *D. and his heirs*. C. *dies, leaving A.* the remainder of C. in this caſe does not veſt it in his executors, but the remainder to D. was well limited. Chan. Caſes, 132. Trin. 21 Car. 2. Wood v. Sanders.

22. *Limitation of a term in truſt for heirs males*, &c. is void in law, and the benefit of the truſt *belongs to the executor or adminiſtrator*. 2 Chan. Rep. 58. 22 Car. 2. in the caſe of Hunt v. Jones.

23. A ſum of money was bequeathed to A. *to diſpoſe as teſtator by a private note* ſhall acquaint him with; *no note* was left. A. ſhall have the money; for teſtator did not intend it to his executors, but had given it from them. Chan. Caſes, 198. Paſch. 23 Car. 2. Martin v. Douch and Overton.

24. *Truſt of a term deviſed to J. S. and then to J. D. to be diſpoſed of as the teſtator ſhould appoint by his will or writing.* He makes a writing and *declares it to himſelf for life, and after to ſuch perſons as he ſhould by will or deed appoint, and for default of that to his executors*, and made no other will or deed, *the executor ſhall have it.* 2 Chan. Rep. 78. 24 Car. 2. Lewis v. Lewis.

25. A *legacy* given and *to be paid at a certain time*, if it is paid accordingly, or ſecurity given for it by the executor, it ſhall not be ſubject to any after *contingent clauſe* in the ſame will; but if the contingency happen within that period of time limited for payment it is otherwiſe. Fin. Rep. 26. Mich. 25 Car. 2. Client v. Bridges.

26. Lands ſettled in truſt for raiſing *portions* for daughters on their marriage *with the conſent of* truſtees, and for their *maintenance* in the mean time; but if they marry without ſuch conſent, then to *remain over* to others; it was admitted, that if either of them die before marriage, her portion would go to her executor or adminiſtrator; the daughters were *advanced in years*, the portions were raiſed, and intending not to marry, prayed to have their portions now paid, to lay them out in annuities for their better ſupport; decreed accordingly, they offering to give reaſonable ſecurity

ſecurity to the truſtees to indemnify them againſt any claim by virtue of the condition, and allowing the truſtees the charge of this ſuit. Fin. Rep. 62. Hill. 25 Car. 2. Needham v. Vernon and Booth.

27. Deviſe of a long *term for years to his wife for life*, remainder to *truſtees for his ſon for life*, remainder in truſt for the *heirs of the body of the ſon*, remainder to the *ſon's right heirs*. The wife *takes* the whole term *as executrix* at firſt, till ſhe agrees to the deviſe. But ſaying ſhe would take the term according to the will is a ſufficient aſſent, or that the ſon was to have it after her, is good aſſent. 1 Lev. 25. Paſch. 13 Car. 2. B. R. Garret v. Liſter.

28. 540 l. was deviſed *to be divided* among three daughters, but if any one or two of them ſhould *die without leaving a child*, that the daughters ſhould *inherit one another's* goods, monies, lands, chattels. A. marries M. (one of the daughters), M. dies without iſſue, A. is intitled to the 180 l. as adminiſtrator to his wife. 2 Chan. Rep. 153. 31 Car. 2. Breadhurſt v. Richardſon.

2 Vent. 342. S. C. decreed accordingly; for a ſum of money cannot be entailed.

29. *Adminiſtrator obtains a decree to redeem a mortgaged term* for years, and before inrolment of the decree *dies inteſtate*. Though the decree was for the mortgagee to convey to the adminiſtrator, his executors, and adminiſtrators, yet the inrolment was denied to his adminiſtrator, becauſe the inteſtate's title, as adminiſtrator to the firſt inteſtate, the mortgagor, is gone. 2 Ch. Caſes, 247. Hill. 30 & 31 Car. 2. Warren v. -----

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30. A. has three daughters, D. a widow, B. married to M. and C. married to N. he leaves 1200l. to *purchaſe* 60 *l. per ann. within one year after his deceaſe, to be ſettled on his ſaid daughters, and the heirs of their reſpective bodies for ever; or otherwiſe D. and the huſbands of B. and C. ſhall give bonds to my executors for double the ſum within* 18 *months* after my deceaſe *to ſettle the ſhare, that each ſhall receive, unto and upon his child and children of my ſaid three daughters, A. B. and C. part and part alike.* B. died about ſix months after the teſtator, leaving iſſue a daughter, who died about four months after the mother. The huſband of B. took letters of adminiſtration to B. and alſo to his ſaid daughter, and brought his bill for a third part of D.'s eſtate; no lands were purchaſed, nor the 400l. given to B. Per Ld. Chancellor the huſband has no right. 2 Chan. Caſes, 110. Trin. 34 Car. 2. Collet v. Collet.

2 Vent. 355. S. C. ſays, that Ld. Chancellor decreed the 400 l. to the plaintiff, but as to the ſurplus of the eſtate which he had likewiſe inſiſted upon, the bill was diſmiſſed. But as to 400 l. intereſt was ordered to be paid for it from the time of bringing the bill.

31. *Lands deviſed to be ſold* for payment of portions, one of the children dies, after the *portion* due, and before the lands ſold; the adminiſtrator of the child is intitled to the money. Vern. 276. pl. 276. Mich. 1684. Bartholomew v. Meredith.

For lands deviſed to be ſold, or in truſtees hands for payment of debts, &c. are to be deemed as money, ſo far as there are debts, &c. to be paid, and ſo money deviſed, &c. to buy lands, it is to be deemed as lands. 9 Mod. 170. Roper v. Radcliff. In Dom. Proc. ----- But with reſpect to the heir at law, or reſiduary legatees, the lands ſo given in truſt, or deviſed for payment of debts or legacies, ſhall be deemed as land, and may by paying the debts or legacies pray a conveyance. Ibid. 171.

32. A. having a ſole child (a ſon) took a *mortgage in fee*, which in equity is but a chattel; this was *in the name of the ſon* and another perſon; the jointenant releaſes to the ſon, but the equity being in the father, it being *the father's money*, the mortgage was decreed to go to the father's adminiſtrators. Arg. 2 Show. 407. pl. 379. Mich. 36 Car. 2. B. R. cites it as the caſe of Newton v. Burnell, in Scacc.

33. A. having *a bill remitted for a particular purpoſe* from beyond ſea to him, receives part of the money, and takes a note for the remainder, payable to himſelf or bearer on demand, and falling ill gives the note to B. with *orders to receive the money, and apply it to the uſe it was deſigned for*. A. dies, B. receives the money, and applies it accordingly. The wife of A. takes adminiſtration, and brings trover and recovers. B. brought a bill, and was relieved by North K. Vern. 264. pl. 260. Mich. 1684. Merrett v. Eaſtwick.

1 Vent. 367. S. C. and upon hearing this clauſe a caſe was made ut antea and referred by the late Ld. K. North to the judges of C. B. who were divided in opinion, but made no certificate thereof * (the reference being determined by his death), and afterwards by order it came to be heard before Ld. Chancellor Jeffries, who upon hearing of the counſel of both ſides decreed it for F. W. the complainant, for that the executorſhip determined at the age of 17 years of W. the ſon, and then the ſurpluſage became an intereſt veſted in him, and could not be deviſed over; and his lordſhip ſeemed to be of opinion, the minority in the clauſe, wherein the deviſe over was, ſhould be underſtood to determine at the ſame time, as in the clauſe of executorſhip.——Vern. 347. pl. 343. S. C. Mich. 1685. decreed by Ld. C. Jefferies accordingly. ——2 Chan. Caſes, 167. Whitmore v. Ld. Craven, S. C. decreed accordingly.

34. *Deviſe of a perſonal eſtate to a truſtee in truſt for teſtator's only ſon, and the heirs of his body, and if his ſon die during his minority, and without iſſue, then to A. and makes his ſon executor, and B. executor in truſt for his ſon during his ſon's minority.* The *ſon lives to* 18, *and then dies without iſſue.* This perſonal eſtate ſhall go to the executor of the ſon, and not to A. Vern. 326. in pl. 323. Paſch. 1685. in caſe of Whitmore v. Weld.

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35. A. deviſed to B. a *rent* out of a leaſe for years determinable on lives to be paid half yearly *if the ceſtuy que vie ſhould ſo long live*. B. dies during their lives, the rent ſhall go to the executors of B. during the term. 2 Vern. 35. pl. 27. Hill. 1688. Goſley v. Gilford, cites Roll, 831.

Carth. 51. S. C. held accordingly.—Show. 25. S. C. adjudged accordingly.—S. P. debated. 2 Show. 407. in caſe of Palmer v. Allicock. ——Vern. 463. in caſe of E. Winchelſea v. Norcliffe.

36. Each next of kin hath ſuch an intereſt in his ſhare of the *inteſtate's eſtate before diſtribution*, that if he dies it ſhall go to his executor. For the act has made it as if the inteſtate had made his will, and ſuch words in a will without doubt an intereſt veſts, and ſo though he to whom diſtribution ought to be made *dies within the year*, that ſhall not alter the caſe; for the proviſo which gives time to make the diſtribution is only for the adminiſtrator and creditors, to the end that the debts ſhould be better known. Comb. 112. Trin. 1 W. & M. in B. R. Brown v. Brown & Farndale.

37. A. makes a deed of *gift of his goods* for the uſe of his wife, and after to *his children*; they are *taken in execution and rebought of the ſheriff*. Here is a new property, and the executor ſhall have

them. 4 Mod. 51. Mich. 3 W. & M. in B. R. Lady Winchelſea v. Maidſtone.

38. J. S. deviſed lands to A. for life, remainder to B. in fee, *paying 400l of which 200l. to be at the diſpoſal of his wife in or by her laſt will* to whom ſhe pleaſes; *ſhe dies inteſtate;* per Lords Commiſſioners, the whole intereſt veſted in the wife, and decreed it to her adminiſtrator. 2 Vern. 181. pl. 163. Mich. 1690. Robinſon v. Duſgate. 2 Jo. 161. Taylor v. Shore.

39. H. poſſeſſed of a term for 99 years, *deviſed his term to A. for life, and ſo on to B. and five others ſucceſſively for life, all ſeven being now dead, the queſtion was, who ſhould have the reſidue* of the term? Et per Treby and Powell anciently, if one having a term deviſed it to A. for life, remainder to B. ſuch remainder was void; 1ſt, Becauſe an eſtate for life is a greater eſtate; and 2dly, Becauſe the term included the whole intereſt, ſo that when he deviſed his term, nothing remained to limit over. Afterwards the law altered; for a deviſe of the term to B. after the death of A. was held good; and by the ſame reaſon to A. for life, remainder to B. For it was but diſpoſing of the intereſt in the mean time, but a deviſe to A. in tail, remainder over, is too remote; ſo if it be to A. and if he die without iſſue, remainder over. As to the principal caſe, they held that *all the remainders were good; and* that *the firſt deviſee, and ſo every deviſee in his turn, had the whole term veſted in him, during which the next man in remainder, and ſo every other after him, had not an actual remainder, but a poſſibility of remainder, and the executor of the deviſor a poſſibility of reverter;* for there may be a poſſibility of reverter even where no remainder can be limited, as in the caſe of a gift to A. and his heirs while ſuch a tree ſtands, no remainder can be limited over, and yet clearly the donor has a poſſibility of reverter, though no actual reverſion; a fortiori there ſhall be a poſſibility of reverter, where a remainder may be limited over; for the teſtator gave but a limited eſtate, and what he has not given away muſt remain in him; and the words for life can be no more rejected in the laſt limitation than in the firſt. 1 Salk. 231. pl. 9. Hill. 9 W. 3. C. B. Eyres v. Faulkland. Ld. Raym. Rep. 325. Ayres v. Falkland S. C. adjudged. [ 165 ]

40. When a perſon is appointed an executor, he *takes all as being named executor.* Per Holt Ch. J. 11 Mod. 126. Trin. 6 Ann. B. R. Bronker v. Cook. The law gives all the goods, chattels, and perſonal eſtate to the executor, by his being named executor he has a right to all the perſonal eſtate. Per Trevor Ch. J. 11 Mod. 162. Hill. 6 Ann. C. B. in caſe of Archer v. Bokenham.

41. At common law and before the ſtatute of frauds, &c. if a man *granted a rent to A. his executors and aſſigns during the life of B. and afterwards the grantee had died leaving an executor but no aſſignee,* the executor ſhould not have had the rent, in regard it being a freehold the ſame could not deſcend to an executor. But now *ſince the ſtatute of frauds,* &c. if a rent be granted to A. for the life of B. and A. dies, living B. *A.'s executors, &c. ſhall have it during the life of B.* See 3 Wms.'s Rep. 264. cites it as held by Ld. K. Harcourt,

court, 4 Dec. 1710. in case of Rawlinson v. Dutchess of Montagu & al'.

The reporter makes a quære, that if this distinction be allowed, settlements of terms hereafter will be done by way of covenant, with such remainders

42. A. possessed of an *Exchequer annuity for 96 years* by articles on the *marriage* of M. his supposed daughter *covenants to pay it to M.* for her separate use, and then *to the survivor of baron and feme for life;* and after *to the children* of the marriage, and *if no child, then to be for the benefit of A.* The husband and wife *die, leaving a child, who dies* soon after. Per Cowper C. A. has not signed the order, nor transferred the property, only covenanted to pay, and a court of equity must not carry the covenant (being *a free gift*) beyond the letter. 2 Vern. 692. pl. 618. Trin. 1715. Basse v. Grey.

over as cannot be done by way of limitation of an estate or a trust. Ibid. 694.——Equ. Ab. 362. pl. 16. S. C. Ld. Chancellor said that it was only a covenant to pay in such manner, and since it never was devested out of A. he would not on this bill on any pretence of equity tear it out of him or his executors, and so dismissed the bill, though he did not at all dispute the case if it had been of a term or a trust of a term settled in such manner that the remainder would not have been good. But this was thought at the bar to be an over-nice distinction.——Gilb. Equ. Rep. 97. S. C. in totidem verbis. But adds, that this decree seems reasonable, because the administrator comes for a specific performance of the covenant, and that he cannot do who was not originally in contemplation or intended to be provided for by the covenant, but that the term had actually been vested to these uses, then the interest of the term being vested in the child and the heirs of his body, as it must be, if the settlement had been drawn according to the covenant, then it must have gone to his administrator.—— MS. Rep. Basse v. Sir James Gray, S. C. Cowper C. said, he thought in this case the defendant ought not to be compelled by a court of equity to assign over the annuity, because the covenant is satisfied already according to the intent of the parties, and this court will not decree a specific performance of a covenant further than the parties intended where the intent is according to the rules of law, and in this case it might have been so limited; for suppose it run thus, (viz.) If the child or children of the marriage shall happen to die in the life of Sir J. Gray then to go to Sir J. Gray, this is a good limitation of a chattle at law, because the contingency is to happen in the space of a life. He admitted, if the legal property of the annuity had been transferred over, and the trusts had been limited in the words of this covenant, the contingent limitation over to Sir J. Gray had been void, but there is a difference between a covenant to suffer one to enjoy, and a transferring the property upon trust for such an one; in the first case the legal property remains in the covenantor, and equity will not take that from him, after the parties have had the full benefit of that agreement, but in the other case the legal property is out of him, and transferred to another; and the cestuy que trust has an equitable interest vested in him, and therefore he may compel his trustee to assign over the legal interest to him. Bill dismissed quoad hoc. MS. Rep. Trin. 1 Geo. in Canc. Bass v. Sir James Gray.

43. Devise of 1200*l. to be distributed* among the four children of B. at B.'s discretion, but not to be compelled to pay it till 12 months after testator's death; one died within six months after testator. It was held that no particular interest vested in any one
[166] child, no apportionment being made, and the whole 1200l. is a subsisting legacy; so nothing goes to the administrator of the child. 2 Vern. 744. Hill. 1716. Bird v. Lockey.

44. J. S. *lessee of land to him and his heirs for three lives assigns the whole estate, reserving a rent to him, and his executors, administrators, and assigns, proviso that on non-payment he and his heirs may re-enter,* and the *assignee covenants to pay the rent to J. S. the assignor, his executors and administrators;* per Cur. here is no reversion to the assignor, and the rent is expressly reserved to the executor, and *the proviso for the heir to enter is not material, as long as the reservation of the rent is to go to the executor.* For in such case the *heir is a trustee for the executor;* this was at the Rolls, and afterwards it came on before Ld. C. King, who was of the same opinion, and

and decreed it to the executor. Wms.'s Rep. 555. pl. 160. Trin. 1719. Jenifon v. Ld. Lexington.

## (Z) What Things the Heir ſhall have, and what the Executor.

### [Chattels Perſonal.]

[1. IF a man buys divers *fiſh*, as tench, carps, &c. and puts them for ſtore *in his pond*, and dies, the executor ſhall not have the fiſh, but the heir who has the water. Hill. 37 Eliz. B. R. adjudged, GRAY v. PAWLET AND BARTHOLOMEW.] Cro. E. 372. pl. 18. Partlett and Bartholomew v. Cray. S. C. adjudged that the fiſh in the pond are the profits of the freehold, which the executor ſhall not have, but the heir or he who has the water.——Gouldſb. 29. pl. 24. Gray v. Trow, S. C. adjudged, that they are chattels deſcendible.——Ow. 20. Grey's caſe, S. C. adjudged.——Went. Off. Executors, 53. cap. 5. S. P. where the teſtator has the inheritance.

[2. If a man dies ſeiſed of a *park*, the heir ſhall have *the deer*, and not the executor. Hill. 37 El. B. R. per Popham.] 7 Rep. 17. b. 18. a. Trin. 34 Eliz. in the caſe of Swans. S. P. for without them the park which is an inheritance is not complete. ——Kelw. 118. pl. 60. ad finem, S. P.——Went. Off. Executors, 53. S. P. where the teſtator has the inheritance.—— But if the teſtator were but a termor they are to go to the executor but only as acceſſary chattels following the eſtate of their principal, viz. park, pond, and the ſame of conies in a warren, pigeons in a dove houſe, &c.

3. Where a man is *bound to another and his heirs*, and the *obligee dies inteſtate*, his heirs ſhall have the action; per Tank. Arg. to which there was no anſwer. Br. Obligation, pl. 19. cites 49 E. 3. 12.

4. The heir ſhall have the box or *cheſt with charters, if it be ſealed*, and not the executors; but if it be not ſealed, the executors ſhall have the box or cheſt, and the heir the charters; per Cur. Br. Chattels, pl. 18. cites 22 E. 4. 7, 8. and 3 H. 7. 15. S. P. Br. Charters de Terre, pl. 46. cites 36 H. 6. 26, 27.——Ibid. pl. 52. cites 3 H. 7. 15. S. P.——Godb. 371. pl. 460. Arg. S. P.

5. A. *pawns* to B. on condition, that if A.'s heir or executor pays the money by ſuch a day, that he ſhall re-have the goods. If the *heir pays the money* after A.'s deceaſe, as he well may, being party to the condition, and named, the executors cannot take the goods out of the heir's poſſeſſion; for it amounts to as much as if the father had given him the goods by gift or by will; per Fineux. [ 167 ] Keilw. 64. b. Trin. 20 H. 7.

6. *A man ſeiſed in fee made a furnace of lead in the middle of the houſe*, which was *not fixed to the walls* of the houſe, and died. The heir entered. The executors took the furnace, and the heir brought treſpaſs. And per tot. Cur. it lies well, becauſe it is fixed to the franktenement; for as well is the land the franktenement as the houſe, and therefore it ſhall go with the franktenement; and Fiſher J. and Rede Ch. J. agreed, that the action Br. Executors, pl. 95. cites S. C.——Br. Treſpaſs, pl. 212. cites S. C.

lies well by the heir; quod nota. Br. Chattels, pl. 7. cites 21 H. 7. 26.

Br. Executors, pl. 95. cites S. C.——Br. Treſpaſs, pl. 212. cites S. C.

7. *So* of *vatts fixed* in the land *in a dyehouſe* or brewhouſe. Ibid.

Br. Executors, pl. 95. cites S. C.—— Br. Treſpaſs, pl. 212. cites S. C.

8. *So* of *pales* or *eſtankes*, and *windows* and *gates*, and *doors* of a houſe ſhall go to the heir, and yet they are not fixed, but it is not a perfect houſe without them. Ibid.

Br. Executors, pl. 95. cites S. C.—— Br. Treſpaſs, pl. 212. cites S. C.

9. *Contra* of *glaſs*; for the executor ſhall have this; for it is a perfect houſe without glaſs; per Pollard, quod non negatur. Ibid.

Br. Executors, pl. 95. cites S. C.—— Br. Treſpaſs, pl. 212. cites S. C.

10. *But* the heir ſhall have the *evidence concerning the land*, and not the executors, and yet they are only chattels in the anceſtor or in the heir. Ibid

Br. Executors, pl. 95. cites S. C.—— Br. Treſpaſs, pl. 212. cites S. C.

11. *And* per Rede the heir ſhall have *tables dormant*, and thoſe things cannot be attached in aſſiſe, nor they cannot be diſtrained, Ibid.

Co. Litt. 210. a. cites Randal v. Brown, S. C. as reſolved Mich. 23 & 24 Eliz. by the two chief juſtices in the court of wards, which Ld. Coke ſaid he obſerved.

12. A. *covenants with B.* that *if B. pay to A.* his heirs and aſſigns, 500l. that A. and his heirs will *ſtand ſeiſed to the uſe of B. and his heirs*. A. deviſed the land to his wife during the minority of his ſon, remainder to his ſon in fee, and died, leaving his wife executrix. B. at the day and place tendered the 500l. generally. The wife, having but an eſtate for years in the land, took the money. Held, that the tender ought to be to the ſon, out of whom the inheritance is to be deveſted; Arg. Le. 252. cites 5 Rep. 96. b. [Mich. 23 & 24 Eliz. in the court of wards]. Randal v. Brown.

13. A. deviſed all his jewels to his lady, yet his *garter and collar of S. S.* ſhall go to the heir. Ow. 124. 26 Eliz. in the Earl of Northumberland's caſe.

So of fiſh in a pond, and doves in a dovehouſe, becauſe all theſe things follow the ſtate of their principal, viz. the park, warren, dove-houſe, pond, &c. Went. Off. Ex. 53.

14. If the owner of a *park*, in which are *deer, hares, rabbits, pheaſants, and partridges*, his heir ſhall have them, and not his executors or adminiſtrators, becauſe without them the park, which is an inheritance, is not complete, and he had no property in them; but they belong to him *ratione privilegii* for his game ſo long as they remained in the place privileged. 7 Rep. 17. b. Trin. 34 Eliz. in the caſe of Swans.

15. *Leſſee*

15. *Leſſee for years purchaſed trees* growing upon the land, and had liberty to cut them within 80 years, and afterwards he *purchaſed the inheritance* of the land, and died. The executor ſhall not have the trees, for though they were once chattels, yet, by the purchaſe of the inheritance, they were united to the land. Ow. 49. Paſch. 36 Eliz. Anon.

16. A. tenant for life of an *advowſon*, remainder in fee to B. A. preſented D. who was admitted, inſtituted, and inducted. But the benefice was void for *not reading the articles* by the ſtatute 13 Eliz. 3. but D. continued in the church, and ſo by reputation was parſon all his life, and *died parſon*, and *no notice given to A. of the voidance* of the church by not reading the articles. The queen preſented, but that was void for want of notice given. A. and D. both died. Per Cur. B. ſhall preſent, and not the executors of A. becauſe as to A. the church was full till notice. Yelv. 7. Trin. 44 Eliz. B. R. Greendit v. Baker.

17. Rent was granted to *A. and his heirs* for his life, and the lives of B. and C. The heir ſhall have this rent as a party *ſpecially nominated, and as heir by deſcent*, though it be not properly an eſtate deſcendible. Cro. J. 282. pl. 3. Trin. 9 Jac. B. R. Bowles v. Poor.

18. *Trees ſold by tenant in tail*, if cut during the life of tenant in tail, ſhall go to the vendee and his executors, but if not cut, the heir ſhall have them. 11 Rep. 50. a. Mich. 12 Jac. Liford's caſe.

Roll. Rep. 101. S. P. by Coke, in caſe of Stampe v. Clinton and Liford, S. C. cites Com. 259. 458.

19. *Tenant for life made a leaſe for* 21 *years, rendering rent at Mich. and Lady-day, or within* 13 *weeks after. The leſſor, after Mich. and before the end of the* 13 *weeks, died;* and his executor brought debt for the rent. Adjudged, that the action did not lie; for in this the leſſee had election to pay it at any of the ſaid days, and before the laſt day it is not due; and when the leſſor died before that day, his executors have no right to the rent; but the leſſor being only tenant for life, *the rent is gone. But if leſſor had had fee-ſimple, and died before the laſt day, the heir ſhould have had the rent as incident to the reverſion; but if leſſor had ſurvived both days, the rent had been a thing veſted in him, and his executor ſhould have had it. But if* the rent had been *reſerved at Mich. and it be behind by* 13 *weeks, that then it ſhould be lawful for the leſſor to enter*, if the *leſſor ſurvives Mich.* his executors ſhall have debt for the rent, becauſe then the rent is due, and *the* 13 *weeks are only a diſpenſation of the entry of the leſſor* until that time; and in this caſe it is ſufficient that the rent be demanded at the latter day as well as at the firſt, as where the rent is reſerved at two days in the diſjunctive. 4 Le. 247. pl. 403. Mich. 12 Jac. B. R. Glover v. Archer.

20. For a *nomine pœnæ* the teſtator himſelf might have an action of *debt*, and conſequently his executors, and yet the nomine pœnæ is an incident which ſhall deſcend to the heir. But this is by the

the common law, and *not by the ſtatute* 32 *H.* 8. 34. *which does not extend to it.* Co. Litt. f. 240. 162. b.

Jo. 231. pl. 2. S. C. reſolved that it was a good reſervation of a rent.

21. Debt by executor; the *teſtator did covenant with the defendant that he ſhould have and enjoy ſuch a houſe and lands for ſix years, the defendant covenanted* for him, his heirs, his executors, and aſſigns, to pay to the teſtator, his heirs, executors, and aſſigns, *a yearly rent of* 90 *l. during the ſix years*; the *defendant entered, the teſtator died*, and the *rent was behind for a year after his death*, for which the executor brought the action. Reſolved it was a rent, and ſo ſhould enſue the reverſion, and ſhould *go to the heir*. Cro. C. 207. pl. 1. Hill. 6 Car. B. R. Drake v. Munday.

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So of a recovery by teſtator of a deed and damages, the heir

22. If one *recovers* in a real action *land and damages*, and dies before execution, the heir ſhall have a ſcire facias to have execution for the land, and the executor for the damages. Cro. C. 227. pl. 4. Mich. 7 Car. B. R. in caſe of Beamond v. Long.

ſhall have execution for the deed, and the executor for the damages. Went. Off. Ex. 92. but ſaid that in the time of E. 4. it was ſaid, that until the heir ſue a ſcire facias the executors cannot ſue execution of the damages.

23. The *teſtator being ſeiſed of tithes during the life of T. P. made a leaſe thereof to the defendant, rendering rent*; afterwards the *leſſee died*, then an action of debt was brought by his executor for the rent arrear; and upon demurrer to the declaration it was argued, that this was a rent, and that the *executors ſhall not have it, becauſe it is incident to the reverſion*, for it is a rent though not in point of remedy. It was argued on the other ſide, that debt lies on the contract which goes to the executors, but perceiving the opinion of the Court againſt him, prayed a diſcontinuance, which was granted. Raym. 18. Trin. 13 Car. 2. B. R. Tippin v. Grover.

2 Freem. Rep. 125. pl. 143. S. C. in totidem verbis.

24. *Mortgagor agreed to convey his equity of redemption, but before the conveyance executed, or the money paid, he died.* Decreed that the heir ſhall have the money, and not the adminiſtrator. 3 Chan. Rep. 63. 22 Car. 2. Tilley v. Egerton.

And if the mortgage money be paid off the heir ſhall have it. Per Ld. Wright. Ch. Prec. 265. Mich. 1706. in caſe of Noys v. Mordant.

25. *Mortgagee in fee enters* for a forfeiture, and after ſeven years enjoyment *abſolutely ſells* the land to *J. S. and his heirs*; per North K. the eſtate ſhall not be looked upon to be a mortgage in the hands of J. S. ſo as to make it part of his perſonal eſtate, but it ſhall be for the benefit of his heir. Vern. Rep. 271. pl. 267. Mich. 1684. Cotton v. Iſles.

3 Salk. 280. pl. 4. S. C. held accordingly. Where two titles concur in an inſtant the elder ſhall be preferred.

27. The ſame perſon being *patron, and parſon dies*, the heir, and not the executor, ſhall preſent; for all is done in an inſtant, the *deſcent to heir, and the falling of the avoidance to the executor*. 3 Lev. 47. Mich. 33 Car. 2. C. B. Holt v. Bp. of Winton, & al'.

2 Chan. Caſes, 223. S. P.

28. If A. makes a leaſe or deviſes an eſtate for years, (he being ſeiſed of an eſtate of inheritance,) for *payment of debts*, if the profits

of the land furmount the debt, all that remains ſhall go to the heir though not ſo expreſſed, and albeit it being in the caſe of an executor. 2 Vent. 359. Mich. 33 Car. 2. Anon.

29. Adminiſtrator of a *copyhold mortgage in fee* (in which there is no covenant to pay the money, nor in any ſuch a ſurrender can there be any ſuch covenant) ſhall not have the redemption money, but the heir. 2 Ch. Rep. 242. 34 Car. 2. Turner v. Crane.

Vern. Rep. 170. S. C. but no decree.

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30. When *lands are appointed* or *conveyed to pay debts*, the heir is intitled to have the lands after the debts paid. 2 Chan. Caſes, 115. Trin. 34 Car. 2. Culpepper v. Aſton.

Chan. Rep. 164. 1651. Ollibar v. Bromfell. S. P.—For it is a reſulting truſt. Per Pratt Ch. J. 9 Mod. 186.——The heir can compel a conveyance in Chancery upon payment of the debts. Nay, he may determine what part of the land the truſtees ſhall ſell. Arg. 10. Mod. 237. Paſch. 11 Ann. in caſe of Roper v. Radcliffe.

31. Reſidue of a perſonal eſtate deviſed by A. to be *laid out in a purchaſe* and ſettled on his 3 daughters, B. C. and D. and the heirs of their reſpective bodies for ever; or *otherwiſe the huſbands* of my ſaid daughters *for what monies they ſhall receive ſhall give bond to the executors, to ſettle what each ſhall receive* upon the child and children of B. C. and D. part and part alike. B. died (leaving a child) about ſix months after the teſtator; the child died about four months after B. No land was purchaſed. Finch C. diſmiſſed the huſband's bill, who had taken adminiſtration to B. and the daughter, and declared the huſband had no part there in right of B. becauſe B. died; and by the firſt part of the clauſe it was to be laid out in land, to be ſettled on the three daughters, and the heirs of their bodies; and by the ſecond clauſe the huſbands were to ſecure what they ſhould receive. 2 Chan. Caſes, 110. Trin. 34 Car. 2. Collet v. Collet.

Nota, it was moved that if land had been purchaſed and ſettled to the wife in tail, the plaintiff ſhould have been tenant by the curteſy, and therefore ſhould have recompence; ſed non allocatur. Ibid. 112.—— It was much inſiſted on for the huſband, that he might have given bond to ſecure the ſurplus to the child, and ſo from his child it would have come to him as adminiſtrator; but ſeeing no intereſt could veſt in the child till the election was determined, (it not being material in this point whether the executor or the huſband had the election,) the father could not claim it as adminiſtrator to the child. And then if the money had been laid out in land, and a ſettlement made according to the direction of the will, the huſband would have had no benefit. For there would have been a joint eſtate for life in the daughters, with ſeveral inheritances, and no ſeverance of the jointure by the marriage and having iſſue, and ſo no tenant by the curteſy. 2 Vent. 356. S. C.

32. Deviſe of *goods to A. for life*, and after A.'s death *to the heir of B.—B. dies, living A.* It was inſiſted that theſe goods were only the furniture of the capital houſe, and ſo *quaſi an heir-loom*; but per Finch C. they abſolutely veſted in him that was B.'s heir at the time of B.'s death. Vern. 35. pl. 34. Hill. 1681. Danvers v. the Earl of Clarendon.

35. *Ceſtuy que truſt of a mortgage for* 1000 *years* afterwards *purchaſed the inheritance* in the name of a third perſon, and the leaſe was aſſigned to herſelf. The heir ſhall have the leaſe to attend the inheritance, and not the adminiſtrator. 2 Chan. Caſes, 156. Mich. 35 Car. 2. ..... v. Langton.

36. A. made a *ſettlement to raiſe a portion* of 4000 l. for two daughters, to be paid at the day of marriage or age, and reſerved a power to order it otherwiſe by his will, and by his will made about

about the ſame time he gives the ſame ſum, payable as directed by the ſaid ſettlement. One dies. Her portion ſhall not go to her adminiſtrator, but the heir ſhall take the profits, and a *aifference* is taken between *a truſt and a legacy*, for that a truſt is expounded according to the intent of the party, and a legacy is governed by the rules of the common law. 2 Chan. Rep. 288. 36 Car. 2. Pawlet v. Pawlet.

37. Lands are limited to the ſecond ſon in fee, provided that if the eldeſt ſon die without iſſue, the ſecond ſon ſhould, within ſix months after ſuch death, *pay 1500 l. to the ſiſter, or in default thereof the lands ſhould go to the ſiſter and her heirs.* The eldeſt ſon dies without iſſue. The ſiſter dies within the ſix months. Her heir, and not her executor, ſhall have the benefit of this deviſe, it being by way of limitation; and Ld. Chancellor ſaid, that relieving in ſuch caſes would deſtroy the known and common difference between a
[ 171 ] limitation and a condition. Vern. 420. Trin. 2 Jac. 2. Winchelſea v. Wentworth.

38. *Inheritrix* carves a term for 1000 years in truſt for her intended huſband for life, and after to her and her heirs. Afterwards the huſband and wife, by fine ſur conceſſ', grant a *term of 21 years, reſerving the rent to huſband and wife, and the heirs of the wife.* The rent ſhall go to the heir; per Lord Jefferies. 2 Vern. 62, pl. 55. Paſch. 1688. Saunders v. Beale.

39. By marriage ſettlement a term was to commence after the deceaſe of the ſurvivor, to raiſe 3000*l. in 12 months for daughters portions.* There being only one daughter, the father by will *deviſes the truſt lands* to make good the wife's jointure, and *to raiſe* 3000*l. for his daughter's portion.* This being a portion to be raiſed out of the land, it ſhall not be raiſed for the adminiſtrator of the daughter, who died at five years old, before ſhe had occaſion of a portion, but ſhall merge in the land for benefit of the heir. 2 Vern. 439. Paſch. 1702. Bruen v. Bruen.

Chan. Prec. 195. S. C. —2 Freem. Rep. 254. S. C.—— Abr. Equ. Caſes, 267. (D) pl. 2. S. C. and adds a nota, that the daughters died within the 12 months, though it does not appear in 2 Vern. 439.——[Neither do I obſerve the S. P. mentioned either in Chan. Prec. or 2 Freem. Rep.]

40. *Term raiſed for a particular purpoſe*, when that purpoſe is anſwered, the heir ſhall have the benefit of the truſt of the ſurplus of the term, but he ſhall have it as a term which muſt *go in a courſe of adminiſtration*, and not in a courſe of deſcent; and per Commiſſioners decreed accordingly for the *heir's adminiſtrator*, and not the heir's heir. 2 Vern. 139. Paſch. 1690. Levet v. Needham.

41. *Leaſe for three lives to B.* by dean and chapter, *habend' to B. his executors*, adminiſtrators, and aſſigns, for three lives. This is an inheritable eſtate, and ſhall go to the heir; per Ld. Somers. 2 Vern. 320. Mich. 1694. St. John's College v. Fleming.

Lands deviſed to be ſold for payment of debts, the perſonal eſtate in the

42. *Lands deviſed* to his executors to be ſold *for payment of debts*, and further wills, that *if* there ſhould be any *ſurplus* after his debts paid, it ſhould be deemed part of his *perſonal eſtate, and go to his executors*; yet executors were decreed to account, and pay over the ſurplus to the next of kin, 2 Vern. 361. pl. 325. Mich. 1698.

1698. in the caſe of Bailey v. Powel, cited as Sir William Baſſet's caſe. hands of the executor is diſcharged, and not contributory; but it is otherwiſe in caſe of adminiſtrators. Lev. 203. Hill. 18 & 19 Car. 2. Feltham v. Harleſton.

43. A. having intailed his lands on his ſon, ſubject to a mortgage term of 1000 years, for payment of 6000l. deviſed his leaſehold and perſonal eſtate to pay his debts and legacies, and directs, that if his perſonal eſtate is applied to pay the mortgage, the 1000 years term ſhould be kept on foot to make good his daughter's portion, and gives her 3000l. *to be paid at* 21 *or marriage, if married with conſent, if not,* 1000l. She died at ſix years old. Per Cur. it is within the reaſon of Ld. Pawlet's caſe; beſides, the deviſe is *contingent* on her marrying with conſent, ſo the portion not to be raiſed for the benefit of the adminiſtrator, but bill diſmiſſed. 2 Vern. 416. Hill. 1700. Yates v. Fettiplace. 2 Freem. Rep. 243. S. C. by name of Yate v. Fettiplace, and there 244. Ld. Keeper Wright ſaid it was a condition precedent, and all one as if he had ſaid, if my daughter marry with conſent of my wife I give 3000l. ——Chan. Prec. 140. pl. 122. S. C. and bill diſmiſſed by the Maſter of the Rolls and Ld. Keeper, and the diſmiſſion affirmed in the Houſe of Lords.

44. Held that a *furnace*, though *fixed to the freehold, and purchaſed with the houſe*, and alſo *hangings nailed to the wall*, ſhall go to the executor, and not to the heir, and ſo determined contrary to Herlakenden's caſe, 4 Rep. 2 Freem. Rep. 249. pl. 316. Trin. 1701. in Canc. Squier v. Mayer. [ 172 ]

45. A term for 500 *years in truſt to pay debts, and four years afterwards to attend the inheritance*, as ſoon as debts are paid, it is a truſt for the heir. 2 Vern. 645. Hill. 1705. in caſe of Counteſs of Briſtol v. Hungerford, cites it as the caſe of Cook v. Gnavas. 9 Mod. 187. S. C. cited per Pratt Ch. J. ſays, it was affirmed in parliament 1712, 15th May.

46. A. having two daughters, *deviſed a mortgage in fee, on which he had entered*, as his lands in fee, *to his two daughters and their heirs*, and another mortgage on which he had not entered, to them, their executors, &c. One of the daughters dies. Her ſhare of the lands in fee ſhall go to her heir, and not to the huſband her adminiſtrator; for though it was but a mortgage, as between A. and the mortgagor, yet A. intended thoſe lands to go as real eſtate to his daughters, and the adminiſtrator of the daughter that is dead ſhall have no part; per Cowper K. 2 Vern. 581. pl. 524. Hill. 1706. Noyes and Ux' v. Mordant. Chan. Prec. 265. S. C. decreed accordingly. ——Gilb. Equ. Rep. 2. S. C. decreed.

47. Deviſe was of 200l. *a year for* 16 *years*, to pay debts and legacies, yet the ſurplus was adjudged a truſt for the heir. 2 Vern. 645. in the caſe of the Counteſs of Briſtol v. Hungerford, Hill. 1709. cites it as the caſe of Sir Cyril Wyche v. Packington.

48. A mortgagee of a term had a *decree to foreclose*, and the heir, an infant, to convey the fee *upon payment of* 20l. at her full age, unleſs cauſe, &c. in ſix months after age. A. before any conveyance of the fee aſſigns the *term to J. S.* in truſt *to attend* the inheritance when it ſhould be conveyed to B. The 20l. was not paid, nor any conveyance made of the inheritance to B. during his life; but becauſe of the decree, and A.'s covenant to convey, it Chan. Prec. 355. pl. 257. S. C. & S. P. held accordingly.

was

was held to be an eſtate of inheritance, and not perſonal eſtate. Gilb. Equ. Rep. 30. Hill. 9 Ann. Kitſon v. Kitſon.

2 Vern. 679. pl. 604. S. C. but S. P. does not clearly appear. —— Gilb. Equ. Rep. 77. S. C.

49. A. *agrees for the purchaſe of lands for* 1000l. *to be conveyed four months after*, and dies in the mean time. The heir of A. may by bill compel the executors to pay the purchaſe-money out of the perſonal eſtate; and ſo may the deviſee, if ſuch contract be deviſed, and it will well paſs by the name of all his lands of inheritance. Ch. Prec. 320. Hill. 1711. Greenhill v. Greenhill.

50. If a *mortgagee ſells*, the *ſurplus money* is to be anſwered to the heir, and not to the executor or adminiſtrator. Arg. 10 Mod. 238. Paſch. 13 Ann.

51. A. *by will ſubjects both his real and perſonal eſtate to the payment of his debts.* Decreed, that the heir ſhould pay the debt, or, in default thereof, the real eſtate to be ſold, and liberty given to the heir to proſecute for the perſonal eſtate. MS. Tab. Feb. 22. 1705. Slydolph v. Langhorn.

52. It is now a ſettled point in courts of equity, that if *lands* be *ſettled*, *or a term* of years *created*, *on truſt to raiſe portions for daughters*, *to be paid at age of* 21 *or marriage*, and the *daughter dies before the time* of payment, the portion ſhall not go to the executor or adminiſtrator of the daughter, but ſink in the eſtate for the benefit of the heir. Comyn's Rep. 742. per Ld. C. Hardwicke. Paſch. 13 Geo. 2. in caſe of Harvey v. Aſton.

53. Although a *real eſtate* is *made liable to debts*, yet it *ſhall only come in aid of the perſonal*, and the perſonal ſhall be firſt applied. MS. Tab. April 12th, 1727. Nokes v. Derby.

[173] 54. Whatever *intereſt in*, *or profits out of a real eſtate*, are *undiſpoſed of by a teſtator*, *deſcend to the heir*; and he takes them, not by the will, or the intent of the teſtator; but they are thrown upon him *by the law*, for want of ſome other perſon to take. Æquitas ſequitur legem. Caſes in Equ. in Ld. Talbot's Time, 44. Mich. 1734. Hopkins v. Hopkins.

## (Z. 2) What is a Chattel to go to the Executors.

1. IF a man *ſeiſed* of land *is attainted of felony*, and the *king has annum diem & vaſtum*, this is only a chattel, and if a ſtranger enters, the lord ſhall have aſſiſe; for the franktenement is in him. Br. Chattels, pl. 16. cites Fitzh. Aſſiſe, 424. tempore E. 1.

Br. Chattels, pl. 24. cites S. C. —— Br. Eſtates, pl. 87. cites S. C. accordingly.

2. If a man is *ſeiſed in jure uxoris*, and after *is attainted of felony*, and the *king ſeiſes the land* for the life of the huſband, the king has only a chattel; for if a ſtranger enters, and the baron dies, there the feme ſhall have aſſiſe, and ſo ſhe had. Br. Chattels, pl. 15. cites 4 E. 3. and Fitzh. Aſſiſe, 166.

3. If a man leaſe for life, *reſerving for the ſix firſt years three quarters of corn by the year*, *and after* the ſix years, if he holds it over, 5 *l. a year*, and after acknowledges a ſtatute within the firſt ſix years, the rent ſhall be extended as a franktenement, and not as a chattel. 15 E. 3. Execution, 63. 2 Roll. 473. Statutes (P), pl. 13.

4. In

4. In quare impedit, a man granted to another the *next preſentation* of ſuch a benefice, and the grant was *to him, his heirs, and aſſigns*, of the next preſentation, and admitted clearly that it is only a chattel, notwithſtanding thoſe words (heirs); for it is but one turn, and where the thing is a chattel, this word heirs cannot make it inheritance. Br. Chattels, pl. 6. cites 39 E. 3. 37.

If a man grants the two next preſentations to W. N. of the church of D. thoſe are chattels, and if he dies the executors ſhall have them and not the heir. Br. Chattels, pl. 20. cites 34 H. 6. 27. Next advowſon is but a chattel; admitted. Owen, 43. per Anderſon C. J. Paſch. 28 Eliz. C. B. in caſe of Yardley v. Peſcan. ——— Before it becomes void it is a real chattel, and after it is a perſonal chattel. See Went. Off. Executor, 54.

5. *So* elſewhere of a *leaſe to W. B. and his heirs for* 20 *years*. Ibid.

6. If a *feme has execution by ſtatute merchant of land*, and *takes baron*, this is a chattel, and the baron may give it, and ſhall have the ſuit alone, if he be ouſted; for it is only a chattel. Br. Chattels, pl. 17. cites 37 Aſſ. 11.

7. If a man be *obliged to another and to his heirs*, and he dies, his *heir ſhall not have action*; for the debt is a chattel, and the heir ſhall not have chattels. Br. Bailment, pl. 2. cites 9 H. 6. 58.

8. *So* if a man *bails a deed to another to re-bail to him or his heirs*, and he dies, the heir ſhall not have action; for the deed is a chattel. Br. Bailment, pl. 2. cites 9 H. 6. 58.

9. The *father who has the ward of his ſon and heir* has it not as a chattel as ward. So of his daughter and heir. But it was ſaid that if the father be outlawed, he ſhall not loſe the ward, and therefore it ſeems that he cannot grant it, nor the executors ſhall not have it, as it ſhall be of a ward; and therefore it is not properly a chattel. Br. Chattels, pl. 19. cites 33 H. 6. 55.

10. So it ſeems though *charters do concern the land of the plaintiff*, yet if he brings detinue of a box with charters, and *he counts of no charter in particular*, the defendant may wage his law of the whole; becauſe before ſhewing of it, the box and all in it is but a chattel. 2 Roll. 108. Ley-gager (F), pl. 1. cites 19 H. 6. 9. b. [ 174 ]

10. *Charters concerning land* are no more than chattels, as *to perſons whoſe land they do not concern*, as if one is bailor and another bailee only of them. See 2 Roll. 108. Ley-gager (E), pl. 3. cites 20 H. 6. 38.

11. Grantee of *a rent for term of years*, grants omnia bona & catalla ſua tam viva quam mortua. The rent paſſes, and yet the grantor cannot put him in ſeiſin of it, but muſt wait the day of payment. Le. 202. Arg. cites 39 H. 6. 35. b.

12. In detinue *of charters* a man may wage his law, if the *plaintiff does not make title to the land*; for if a man gives to me a deed of feoffment, it is only a chattel in me; per Pigot, quod non negatur. Br. Charters de Terre, pl. 57. cites 8 E. 4. 3. Br. Chattels, pl. 12. cites S. C.

13. *Deed of tail or* of *land* is not chattel, but is inheritance, and does not paſs by theſe words, omnia bona & catalla, but belongs to the heir, and replevin does not lie of it. Br. Chattels, pl. 9. cites 4 H. 7. 10.

14. In

14. In treſpaſs quare vi & armis ſedulam ſuam fregit et aſportavit, defendant ſaid, that the *ſeat* was *in the church* of D. whereof J. N. was parſon, and he by his command, &c. Eliot ſaid, this is no plea, for a ſeat is a chattel, and not parcel of the franktenement. But Butler e contra; for it is fixed to the franktenement, therefore parcel, as a furnace, &c. Per Fairfax, neither *furnace* nor *fatts* are parcel, nor *booths in a fair*, nor *table dormant*. And per Huſſey, it ſeems that ſeats in a church is ſpiritual matter, and therefore ſhall be ordered by the ordinary, and that every one may remove the ſeat for their eaſe, if he, &c. has had it there by preſcription. Br. Chattels, pl. 11. cites 8 H. 7. 12.

15. An *intereſſe termini* is a chattel. Pl. C. 150. 3 Mar. Throgmorton v. Tracy.

16. Where rent was granted to a man in fee, and if unpaid, &c. that he, his heirs, &c. may enter and take the profits to him, his heirs, and aſſigns, and *to retain till he is ſatisfied ſuch a ſum*, it is a chattel. Arg. 2 Roll. Rep. 13. in Havergil and Hare's caſe, cites 4 Rep. 81. Mich. 41 & 42 Eliz. Sir Andrew Corbet's caſe.

17. When *recognizances* are forfeited, they are but chattels perſonal. 12 Rep. 2. Paſch. 4 Jac. Ford v. Sheldon.

18. If *lands* are conveyed *to the uſe of A. and B. and their heirs till* 1000l. be raiſed, it is a fee ſimple limited or conditional. The difference is between a limitation of a uſe *to A. until* 1000l. raiſed, that perhaps in a uſe may be a chattel, but if *to A. and B. until* ſo much be raiſed, perhaps it is doubtful. Per Bridgman Ch. J. Cart. 107. Mich. 18 Car. 2. C. B.

19. If the limitation was *to A. and B. and their heirs for ſo many years as ſhall be from ſuch a time to ſuch a time*, it had been but a term, it makes it not a fee ſimple what was after qualified to a term for years. Arg. Cart. 166. cites 10 Rep. 85. Loveis's caſe.

Deed of entail is not a chattel, for it is inheritance as the land is, and of the nature of the land, and ſhall go to the heir. Per Fairfax and Huſſey. Br. Charters de Terre, &c. pl. 53. 4 H. 7. 10.

But if a deed of feoffment be given to me of land to which I make no title, this is only a chattel in me. Per Pigot. Quod non negatur. Br. Charters de Terre, &c. pl. 57. 8 E. 4. 3.

20. *Leaſe for years* is real. Went. Off. Ex. 52.

21. *So wardſhip of lands* held *by knight ſervice*. Went. Off. Ex. 53.

[175] 23. *So extent upon judgments*, ſtatutes, or recognizances. Went. Off. Ex. 53.

24. Things iſſuing out of houſes or land, as *rents*, *commons*, *eſtovers*, &c. *corodies*, *advowſons*, *tithes*, *fairs*, *markets*, *profits of leets*, &c. which teſtator had *for years*, are chattels real. Went. Off. Ex. 53, 54.

25. The *year, day and waſte* forfeited to the crown on attainder of felony is but a chattel, and though granted to one and his heirs by the king, yet ſhall go to the executor and not to the heir. Went. Off. Ex. 54.

26. *Wardſhip*

26. *Wardſhip of the body* whether by tenure or aſſignment was a chattel real *in reſpect of the tenure of land*, and was for years, viz. till 21, or marriage. Went. Off. Ex. 52, 53. Br. Chattels, pl. 3. cites 14 H. 4. 24.

27. *So* a *villain for years* (as by grant for a term from him that had the inheritance) is a chattel real. Went. Off. Ex. 53.

28. An *apprentice* ſeems to be only a perſonal chattel. Went. Off. Ex. 53.

29. Becauſe not ſpringing out of any real root as wardſhip and villenage do, but out of mere contract. Ibid. 56.

27. The intereſt in a *debtor in execution for debt*, or more properly in his liberty, ſeems only a perſonal chattel. Went. Off. Ex. 53.

28. *So* of a *priſoner taken in the wars*. Went. Off. Ex. 53.

29. Any intereſt out of land in which the grantor has only a *term* though ever ſo long, and though he *grants it in tail*, or for life, limiting it as a freehold, can be no other than a mere chattel. Went. Off. Ex. 55. ſays *partus ſequitur ventrem*.

30. *Extent upon a ſtatute* is but a chattel notwithſtanding it is delivered to the party as a freehold, viz. *ut liberum tenementum*, but that makes it only to be quaſi liberum tenementum as to the maintaining of aſſiſe if wrongfully put out. Went. Off. Ex. 55.

31. *Patentee of land*, or other hereditament, *whereof a traitor was ſeiſed in right of his wife*, has only a chattel intereſt in the profits, though granted to him and his heirs, and it ſhall go to his executors. Went. Off. Ex. 55.

32. *Dung in a heap* is a chattel, but if *ſpread on the land* it is not. Per Roll J. Sty. 66. Mich. 23 Car. Carver v. Pierce. All. 31, 32. Yearworth v. Pierce, S.C. & S.P. by Roll.

33. *Graſs growing* is part of a freehold, and not a chattel. 3 Salk. 161. cites 1 Vent. 187. Hill. 23 & 24 Car. 2. B. R. Emerſon v. Emerſon.

34. Intereſt under an *extent* of lands on a judgment by elegit is but a chattel intereſt; per Jefferies C. Vern. 398. Paſch. 1686, in caſe of Clobery v. Simonds.

35. *Corn ſtanding* is a chattel. 3 Salk. 160. pl. 3. Anon. Vent. 187. Hill. 23 & 24 Car. 2. B. R. Emerſon v. Emerſon. S. P.

36. So *trees growing* are not goods and chattels. 11 Mod. 113. 121. Paſch. and Trin. 6 Ann. B. R. The Queen v. Harris. But if one ſells land in fee, and excepts ſuch and ſuch trees, this is a chattel intereſt. Went. Off. Ex. 60.——So of trees ſold to J. S. who dies before felling them, the executor of J. S. ſhall have them. Went. Off. Ex. 60.

37. A. ſeiſed in fee deviſed, that *if his perſonal eſtate ſhould not be ſufficient to pay his debts and legacies*, then *his executor ſhould receive the profits of his real eſtate for the payment thereof, and after payment he deviſed the real eſtate to B. &c.* The executors have only a chattel intereſt. Wms.'s Rep. 505. 509. ſays it was ſo held in the Houſe of Lords, upon taking the advice of all the judges. 22 May 1717. on the appeal of Coppen, Barnardiſton, &c. [ 176 ]

## (Z. 3) What Executors muſt do in Favour of the Heir.

1. THE *father of A. articles with J. S. a carpenter, to build an houſe, and* covenants *to pay J. S.* 1000*l. to build it, but A. before the building dies inteſtate.* The *heir of A. on whoſe eſtate this houſe was to be built, brought a bill againſt the adminiſtratrix of A. to compel her to perform this agreement ſpecifically,* and decreed accordingly. 2 Vern. 322. pl. 310. Mich. 1694. Holt v. Holt.

2. *Articles on marriage, whereby money is agreed to be laid out in land, and ſettled, in default of iſſue male of the marriage, on the huſband's brother,* ſhall, *if the huſband dies without iſſue male, and leaving only daughters,* be performed in favour of the brother, though they were voluntary, and though the huſband might have barred ſuch remainder. 3 Wms.'s Rep. 223. Mich. 1733. cites 2 Wms.'s Rep. (594.) Vernon v. Vernon.

3. A. *covenants for himſelf and his heirs, that he will purchaſe lands and ſettle the ſame on himſelf for life, remainder to his wife for life, remainder to his firſt, &c. ſon,* remainder *to himſelf in fee.* Equity will compel the executor to lay out the money, though the heir is both debtor and creditor. 3 Wms.'s Rep. 224. Mich. 1733. Lechmere v. Ld. Carliſle.

## (Z. 4) What Things ſhall not go either to the Executor or Heir.

### Donatio Cauſa Mortis.

1. A Donatio cauſa mortis *is in fraud of the cuſtom of London.* Fin. Rep. 16. Mich. 25 Car. 2. Dethick v. Banks.

Equ. Rep. 13. S. C.

2. A donatio cauſa mortis *is* where a man lies in extremity, or being ſurpriſed with ſickneſs, and not having an opportunity of making his will, but, leſt he ſhould die before he can make it, he gives with his own hands his goods to his friends about him. This, if he dies, ſhall operate as a legacy; but if he recovers, then the property thereof reverts to him. Per Ld. Cowper, Chan. Prec. 269. pl. 220. Mich. 1708. Hedges v. Hedges.

3. A. by will gave B. 500l. and ſome months after A. by parol (which he called his ſervants to be witneſſes to) gave her a *hair trunk,* and often afterwards remembered them of his having made to B. ſuch gift, and it was in theſe words: *I give to my couſin B. this hair trunk, and all that is contained in it,* and gave her the key. Afterwards A. *makes a new will, and revokes all other,* and gives B. 1000l. but ſays nothing of the hair trunk, and this will was about *three years after the firſt will.* Upon opening the trunk were found a tally for 500l. &c. Ld. Cowper took notice that it was agreed that a donatio cauſa mortis was revocable, and *differed nothing*

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*thing from a will*, and thought in this caſe were only two points: 1ſt, If the tally was fully proved to have been in the trunk at the time of the gift. 2dly, If the will was not a revocation of it. As to the firſt, ſuch donations being of the ſame kind with the will, ought *to be fully proved in all its circumſtances*, and that A. did not mention the tally, when he ſo often mentioned the trunk, was ſtrange. As to the ſecond, that the ſecond will revoking all former wills was a ſatisfaction equivalent to a revocation, and the 1000l. thereby given her was a recompence, unleſs ſhe could prove that A. intended it otherwiſe; for if ſhe could, then the donatio cauſa mortis muſt have ſtood, and ſo reverſed a decree of the Maſter of the Rolls. Chan. Prec. 300. pl. 234. Trin. 1710. Jones v. Selby.

4. A. made B. his *executrix and reſiduary legatee*, and afterwards *gave a ſpecie bill of* 100*l. to J. S. to deliver over to C. in caſe A. ſhould die of that ſickneſs*, which accordingly happened. C. brought a bill for the 100l. note. And Ld. Cowper held the caſe not ſo ſtrong as if A. had ſpecifically deviſed this 100l. note [to B]; for deviſing the reſiduum is only the reſt of his eſtate, that he ſhould not by will or otherwiſe diſpoſe of. But this 100l. note is a gift in teſtator's life-time, donatio cauſa mortis, and the poſſeſſion tranſmitted, and the will did not hinder teſtator from giving away any part of his eſtate abſolutely or conditionally; and decreed C. the 100l. with coſts. Wms.'s Rep. 404. Hill. 1717. Drury v. Smith.

5. *But* where *jewels* were given away by teſtator, by way of donatio cauſa mortis, the Maſter of the Rolls doubted whether this was good *againſt debts*. Wms.'s Rep. 406. in a nota there cites 8th Dec. 1718. Smith v. Caſen. —— And the reporter ſays, that it ſeems not, they being given in caſe of the donor's death, and in *nature of a legacy*, which therefore would be *fraudulent as againſt creditors*. Ibid.

6. An *huſband, lying on his death-bed, delivered a purſe of* 100 *guineas to his wife, and bid her apply it to no other uſe but her own*; this was held by the Maſter of the Rolls clearly to be donatio cauſa mortis, becauſe the huſband was then languiſhing on his death-bed; and alſo, becauſe the huſband could not otherwiſe give to his wife, and ſaid that this was in nature of a legacy to her. Wms.'s Rep. 441. Trin. 1718. Lawſon v. Lawſon.

7. And alſo he gave a bill to her, drawn by him on a goldſmith, to pay her 100l. to buy her mourning, and maintain her till her jointure comes in. It was held by the Maſter of the Rolls, that *donatio cauſa mortis* need not be proved with the teſtator's will, neither need any ſuch gift, though *in nature of a legacy*, be ſo proved; for that they *operate as a declaration of truſt upon the executor*. Wms.'s Rep. 441. Trin. 1718. Lawſon v. Lawſon.

8. C. after making his will, *three or four days before his death, gave D. ſome Bank notes to her own uſe if he died, elſe to be returned*; on his death, *A. who was his executor, on inquiring into the affair*, ſaid, he was *very well pleaſed* that they were given her; ſhe deſired A. to keep the notes for her, and employ them to the beſt advan-

tage for her; he took them, and gave her a note for them; ſhe having after married contrary to his inclination, he refuſed to deliver up the notes; on which action was brought on his note, and a recovery and damages. Bill was brought here to be relieved, but relief denied. Curia, You come here to be relieved againſt the note, which cannot be, but on the foot of fraud; at
[ 178 ] the time of giving it, the whole affair was examined; *it is not a legacy, nor is there any occaſion for the executor's aſſent to it;* it is not a gift at common law, but in view of death; here are expreſs words; but if he had uſed no words, and had been near death, it had been looked on as a donatio mortis cauſa; *it is a teſtamentary legacy, of which the common law takes notice, but not provable in the eccleſiaſtical court,* it is only queſtionable here; and the executor's aſſent is not neceſſary, becauſe he might die inteſtate. This further differs from a legacy, which depends ſolely on the diſpoſing words; but *in a donatio mortis cauſa muſt be a delivery,* which is ſomething more; ſo bill diſmiſſed with coſts. This cauſe was reheard before Ld. Chan. King, Auguſt 6th, 1725, and affirmed the decree, only he altered it in reſpect of the defendants coſts, who being truſtees ſhould have it out of the eſtate; but inclined to have ordered a trial at law, had A. not given a note. Sel. Caſes in Chan. in Ld. King's Time, 14, 15. Paſch. 11 Geo. Aſhton v. Dawſon and Vincent.

9. In every donatio cauſa mortis *delivery muſt be made by the party in his laſt ſickneſs,* and it may be to a wife being in nature of a legacy, but need not be proved with the will. 3 Wms.'s Rep. 357. Trin. 1735. Miller v. Miller & al'.

10. There *can be no gift of a bond or choſe en action by way of donatio cauſa mortis,* neither can any thing operate as ſuch without having been delivered in the teſtator's life-time by him or his order. 3 Wms.'s Rep. 358. Trin. 1735. Miller v. Miller & al'.

This in Roll is in fol. 911. but it has no letter annexed to it there.

## [(Z. 5) What Things the Wife ſhall have, and not the Heir or Executor.]

### Paraphernalia.

[1. IT ſeems that *true name* of this is paraphernalia, or *bona parapherna*; for by the civil law bona parapherna ſunt quæ mulier ultra dotem adfert taken from the Greek word, & de his bonis maritus adminiſtrationem habet ita ut ſine ſpeciali uxoris mandato & agere & convenire poſſit. Minſing upon the Inſtitutes, 97.]

Bona paraphernalia are confined to the ornaments of her perſon, and therefore ſhe

[2. The *petit cuſtoms de Normandie,* chap. de Donaires de Femes, ſ. 395. bona paraphernalia ought to be *underſtood of moveables ſerving to the uſe of the wife, as ſerving* beds, robes, linen, and other things of like nature; whereof the judge ſhall make an honeſt diſtribution to the widow in being, in *regard to the quality of her and her huſband,* calling nevertheleſs the heir and creditors, provided

vided that the ſaid goods do not exceed the *moiety of a third of the moveables*, and nevertheleſs where the moveable ſhall be *but little*, ſhe ſhall have her bed, her robe and her coffer. (It ſeems that this agrees wholly with paraphonalia in our law.)

cannot claim dowry-money as ſuch, which laſt is rather a gift to the church, it being to be laid out upon the book. 2 Wms.'s Rep. 79. Trin. 1722. in caſe of Burton v. Pierpoint, cites Gibſ. Cod. 1 Part. 519.

[3. There is *mention made of this in our law*, where it is named *bona paraphonalia*, as 12 H. 7. 23. * 18 E. 4. 11. b.]

* Br. Teſtament, pl. 13. cites S. C. but not S. P. but only that the word is paraphonalia.

[4. The *apparel of the wife is called* bona paraphonalia. 18 E. 4. 11. b. Per Vaviſor.]

[5. The feme after the death of the baron ſhall have *her neceſſary apparel* for her body, and not the executors of the baron. 37 H. 6. 28.] [ 179 ]

[6. So the feme ſhall have *convenient apparel* for her body, and not the executor of the baron. 33 H. 6. 31. b. Brook, Executors, 19.]

Br. Adminiſtrator, pl. 6. cites S.C. & S.P. admitted.

——Fitzh. Executor, pl. 24.

[7. But after the death of the baron the feme ſhall not have *exceſſive apparel*, but the executor ſhall have them. 33. H. 6. 31. b. Brook, Executors, 19.]

Br. Adminiſtrator, pl. 6. cites S. C. but ſays it is doubted there if ſhe ſhould have exceſſive apparel.

[8. If the *baron delivers to the wife a piece of cloth to make a garment and dies*, though this was not made into a garment in the life of the baron, yet the feme ſhall have it, and not the executor of the baron, inaſmuch as it was delivered to her to this intent; but againſt *debtee* of the baron the wife ſhall not have more apparel than is *convenient*. Mich. 40 & 41 Eliz. B. R. HARWELL AGAINST HARWELL.]

[9. A *chain of diamonds and pearl* worth 370 l. being *uſually worn* by a feme, who was the *daughter of an earl of Ireland, and a baron of England, and the wife of a knight and a ſerjeant at law of the king*, ſhall be bona paraphonalia, ſo that the baron cannot deviſe them from the wife, but the deviſe ſhall be void, per Cur. Tr. 8 Car. B. R. LORD HASTINGS AGAINST DOWGLAS upon a ſpecial verdict, the defendant having married the wife of Sir John Davies, who uſed the chain in the life of Sir John. Hill. 9 Car. B. R. this was argued per Curiam, and Richardſon and Croke thought that the wife ſhould not have them, though *no debts*, becauſe of the deviſe, ſcilicet, that ſhe ſhould not have them *againſt the will of the baron*, becauſe *they were not neceſſary* for her *though convenient*; but Jones and Berkley e contra, becauſe convenient for her to wear; but Jones ſeemed that ſhe ſhould not have them as paraphernalia, but *by the law of reaſon and convenience*; but all the Court agreed that ſhe ſhall have her neceſſary apparel as paraphernalia, and the *baron cannot deviſe* them *from her*, becauſe *neceſſary* that ſhe ſhould not

Though when A. dies inteſtate, or by will does not diſpoſe of the jewels, his wife may claim (in caſe there are no debts) the jewels ſuitable to her quality to be worn as the ornaments of her body as her paraphernalia, yet held Cro. Car. 343. pl. 4.

5, 6. 1 Roll. Abr. 911. (9) that if not go naked, but to be preſerved from ſhame and from the cold.]

the huſband by will deviſes away the jewels, ſuch deviſe ſhall ſtand good againſt the wife's claim of paraphonalia. Arg. 2 Vern. 246. Mich. 1691. Clergis v. Ducheſs of Albemarle.

Huſband deviſes the wife's jewels to the wife for life, remainder to his ſon. The wife makes no election or claim to have the jewels as her paraphonalia. Her adminiſtrator cannot make this claim. 2 Vern. 247. Mich. 1691. Clergis v. Ducheſ of Albemarle.

The huſband deviſed the jewels which were the paraphernalia of the wife and died. They were decreed to the wife. Chan. Caſes, 240. Mich. 26 Car. 2. Cary v. Appleton.

Mo. 213. pl. 354. S. C. Manwood Ch. B. ſaid, that in the conſideration of judges, payment of debts is to be preferred before the allowance of jewels to the ladies; but becauſe they have no notice by the record of debts, they may more amply adjudge paraphernalia to the Viſcounteſs; and judgment for the Counteſs.

10. The executor of Viſcount Bindon brought detinue againſt the widow of the deceaſed Viſcount, and declared upon the detainer of certain jewels. The defendant did juſtify the detainer of them as her paraphernalia. It was ſaid by Manwood Ch. B. that paraphernalia *ought to be allowed to a widow, having regard to her degree;* and in this caſe the huſband of the defendant being a viſcount, 500 * marks was but a good allowance for ſuch a matter. 2 Le. 166. pl. 201. Paſch. 26 Eliz. in the Exchequer, Bindon's (Viſcounteſs) caſe.

* [ 180 ]

Bona paraphernalia are not deviſable by the huſband from the wife any more than heir-looms from the heir, ſo that the right of the wife to her paraphernalia is to be preferred to that of a legatee. Per Ld. C. Macclesfield. Wms.'s Rep. 730. Mich. 1721. Tipping v. Tipping.

11. The huſband *by will gives goods*, which the defendant pretends belongs to her as paraphernalia. The deviſe is good. Toth. 142. cites 5 Car. Davenport v. Lady Robinſon.

12. *He may diſpoſe of them in his life-time, but he cannot make a will of them; but upon the death of the huſband, the property is immediately veſted in her;* per Berkley and Jones J. Cro. C. 344. Hill. 9 Car. B. R. Haſtings v. Douglas.

13. By the civil law, bona paraphernalia *ſunt quæ mulier ultra dotem adfert*, the uſe and occupation whereof, though in a peculiar ſenſe, do belong to the wife, yet not in ſuch a ſeparate way but that the huſband, during his life, or by any act executed in his life-time, may diſpoſe thereof, or ſue for the ſame; but *in a proper ſenſe they are ſuch things as are peculiar to the wife*, as ſuitable to her condition, and neceſſary or convenient for her in her huſband's family; ſo it comprehends the wife's convenient apparel, with her bed, jewels, and ornaments of her perſon. Orph. Leg. pag. 130.

14. *Daughter's portion* being to be paid *out of the perſonal eſtate* of her father, the Court would not allow the widow to retain her paraphernalia. Fin. Rep. 146. Mich. 26 Car. 2. Shipton v. Hampſon.

15. It is agreed by *marriage articles*, that the feme ſhall *have no part of the huſband's perſonal eſtate*, but what he ſhould give her by his will; this bars her of her paraphernalia, and from jewels given to her by her huſband in his life-time. 2 Vern. 83. Mich. 1688. Cholmly v. Cholmly.

16. The

16. The widow must not have her paraphernalia where the *personal estate is deficient to pay the debts*, and must be aided by the real. Fin. Rep. 415. Hill. 31 Car. 2. Stubbs v. Stubbs.

The reason why the law has subjected them to the husband's debts is, because they are only superfluities and ornaments. Per Ld. Cowper. Chan. Prec. 297. Trin. 1710. in case of Wilson v. Pack.

17. By the *custom of London*, a citizen's widow may retain some part of her jewels as paraphernalia, but not the whole. Nels. Chan. Rep. 179. Mich. 1691. Cholmly v. Cholmly.

18. *Jewels* and chamber plate, *bought out of the wife's pin-money*, and amounting to no more than 500l. were decreed to the wife, being of a small value in respect of the husband's estate. Chan. Prec. 27. Trin. 1691. Offley v. Offley.

19. The question was, if the husband can *devise the paraphernalia of the wife* to any other than the wife? Sir J. Jekil, *creditors may come in* against the wife to have her paraphernalia, *but not a devisee* under the will of the husband; and there is not one case in the law to warrant such a devise, and it is no argument to say that the *husband may dispose of them in his life-time*, therefore he may give them away by will; for he may dispose of his wife's wearing apparel, or a term in the wife in her life-time, but he can dispose [ 181 ] of neither by his will. Lady Rawleigh, relict of Sir C. Rawleigh, did claim her paraphernalia against the devisee of her husband; but I believe the matter was made up between the parties, for I do not remember any judgment given in that case. See Cro. Car. 343. Per Northey Attorney-General, there is not one authority in the law that the husband cannot devise the paraphernalia of his wife; it is true, the executor of the husband shall not take the paraphernalia of the wife from her, and the case in Cro. Car. 343. goes no further. It is the constant practice in great families to give the family jewels to the wife for her life, and after her death to the eldest son, and I never knew such a devise called in question, but always submitted to. Harcourt C. said, that this is a point of consequence, and I will reserve the consideration of it till after the Master's report upon the account; Curia advisare vult. MS. Rep. Trin. 13 Ann. Canc. Wilcox & Ux' v. Gore & al'.

20. Where a *baron borrowed of his sister jewels to present his wife on his marriage*, Cowper C. said, this giving of them is a change of the property, and a kind of sale in market overt, and on a devise of real and personal estate for payment of debts, if the personal is not sufficient, and the real be, and the husband *devises to her all her jewels*, &c. she shall have the specific legacy of her jewels. Pasch. 1715. Canc. Parker v. Harvey.

21. Mr. Calmady *having a crocheat of diamonds, which was his first wife's*, in 1695 makes his will, and, amongst other things, *devises this crocheat to his eldest son, and that it should go in succession to the heir of his family as an heir-loom*, afterwards, in 1699, he *marries a second wife* (the now defendant), *and turns this crocheat into a necklace, and adds several new diamonds to it to the value of* 200*l.*

*which was more than the value of the crocheat;* the plaintiff, as heir to Mr. Calmady, (though not the eldeſt ſon, to whom it was ſpecifically deviſed,) demands this crocheat of the defendant, the widow of Mr. Calmady. Counſel for the defendant inſiſted that the defendant was intitled to it as part of her paraphernalia, which the huſband cannot give away from his wife by will, though he may diſpoſe of it in his life-time, and the wife ſhall retain it againſt the deviſee or executor of her huſband, unleſs in the caſe of creditors, who cannot otherwiſe have a ſatisfaction of their debts. Counſel for the plaintiff ſaid, that though formerly it was a doubt whether the huſband could deviſe any part of the paraphernalia of the wife, yet of late it has been holden, that the huſband may deviſe ſpecifically jewels of his own which he permitted his wife to wear, though they ſhall not go to his executor or to a general reſiduary legatee, and that in this caſe, there being no direct proof of an expreſs gift to the wife, only a permiſſion to wear them, they are well deviſed to the heir as an heir-loom, and that the altering and turning the crocheat into a necklace, and permitting his wife to wear them, was no revocation of the deviſe. Parker C. ſeemed to doubt at firſt, that turning the crocheat into a necklace, adding new diamonds to it, and permitting his wife to wear it, was a revocation of the deviſe, but at laſt *ordered the Maſter to examine and ſeparate the old diamonds from the new, and decreed the diamonds of the crocheat to the plaintiff as heir at law, and ſpecifically deviſed to him as an heir-loom.* MS. Rep. Mich. 5 Geo. in Canc. Calmady v. Calmady.

S. P. Not in favour of a deviſee who is only a hæres factus. 2 Wms.'s Rep. 544. Trin. 1729. at the Rolls, Tynt v. Tynt.

22. Bona paraphernalia are *liable to debts only*, and *in favour of creditors, not of an heir;* but any *creditors by ſpecialty* are wholly unconcerned in this queſtion, they being by reaſon of their bonds, &c. in all events ſecure, which muſt make it indifferent to them whether * they are paid out of the real aſſets, or out of the bona paraphernalia; per Ld. C. Macclesfield. Wms.'s Rep. 730. Mich. 1721. Tipping v. Tipping.

* [ 182 ] 23. *Baron covenanted,* obliging his heirs and executors *to make a jointure* on his wife, and dies; the *wife claims her paraphernalia, and alſo* that ſhe may have *her jointure, or a ſatisfaction for it out of the perſonal eſtate.* Per Parker C. ſhe ſhall have the paraphernalia, 1ſt, That in many caſes the huſband ſhall be looked upon as a purchaſor of the paraphernalia. 2dly, That ſhe takes them by a right of an higher nature than an executor, for an executorſhip is only a truſt, to ſee the teſtator's eſtate diſpoſed of according to direction; ſo that, 3dly, As theſe paraphernalias are not ſubject to the baron's diſpoſitions by will, ſhe ſhall hold them againſt a legatee; and, 4thly, If ſhe is to hold them againſt a legatee, it is the common juſtice of the court, where an heir and an executor are equally liable, as to let in the heir to pay ſo much of the debt, as that the legatee may be paid his legacy, in many caſes to put the legatee in the place of the creditor; and, 5thly, If the legatee is to be paid preferable to the heir's having aid of

the perſonal eſtate, and the paraphernalia are of an higher nature, an heir ſhall not have them. * Here is no deficiency of aſſets. Wms.'s Rep. 729. Mich. 8 Geo. Canc. Tipping v. Tipping. They do not go to an executor, but on want of aſſets.

* It being admitted that perſonal aſſets, together with real, are ſufficient to pay debts, and ſatisfy this covenant.

23. If *creditors of teſtator by judgment take the jewels after his death in execution*, when the heir, or executor, or truſtees, have *other aſſets* ſufficient to pay ſuch debts, this is a default in the truſtees, for which the widow ought not to ſuffer as to her bona paraphernalia. 2 Wms.'s Rep. 80. Trin. 1722. Burton v. Pierpoint.

24. *But* where the *jewels* were *expreſsly bequeathed to the widow*, there notwithſtanding that at the time of teſtator's death there were no aſſets real or perſonal, yet if *afterwards aſſets happen*, though by ſo remote an accident as the determining of an eſtate tail, and the reverſion in fee thereby falling in, there can be no inconvenience to any creditor or others, and the legacy ſhould be paid, and teſtator's intention performed, and the rather becauſe here the *real and perſonal aſſets were by the will made liable to the debts and legacies*. And in the principal caſe [the will directed and] all the legatees were decreed to be paid before the reſiduary legatee ſhould take any thing. 2 Wms.'s Rep. 78. 81. Trin. 1722. Burton v. Pierpoint.

25. If the *real and perſonal aſſets, at the time of the huſband's death, are not ſufficient for payment of debts*, they are loſt as to the widow, notwithſtanding that by an after accident aſſets fall in as by a reverſion in fee falling in upon a determining of an eſtate in tail. 2 Wms.'s Rep. 79. Trin. 1722. Burton v. Pierpoint.

## (Z. 6) Diſtribution. In Caſe of Inteſtacy. How at Common Law before 22 & 23 *Car.* 2. cap. 10.

*[183]

1. IN a prohibition to a *ſuit* in the ſpiritual court, *to oblige an adminiſtrator to make diſtribution*, and upon long and ſolemn arguments, and hearing the civilians at large, it was reſolved that the * eccleſiaſtical court could not oblige the adminiſtrator to make diſtribution, and that their obligations, taken to ſuch intent, were void. Per tot. Cur. Lev. 233. Hill. 19 & 20 Car. 2. B. R. Hughes v. Hughes.

See Cart. 125 to 136. the caſe largely argued Trin. 18 Car. 2. by common lawyers and civilians.—S. C. cited by Ld. C. King thus, viz. one died inteſtate leaving a conſiderable perſonal eſtate, and a ſon and daughter. The ſon adminiſtered. The daughter contended for a ſhare in the ſpiritual court, where it was thought a hardſhip that the ſon ſhould have all; and yet the daughter was prohibited at law. However the ſtatute of diſtributions takes away the adminiſtrator's pretenſions (which he before had made with good ſucceſs) of retaining the whole. It is true, that in caſe any child had been advanced by a freehold, the ſpiritual court would not meddle with that; but the act of parliament has therefore gone further than ever the ſpiritual court intended to go, to make this freehold ſettled upon a younger child by the father, be brought into hotchpot. 2 Wms.'s Rep. 448. Hill. 1727. in caſe of Edwards v. Freeman.

2. At

2. At common law the *ordinary had the diſpoſal* of the inteſtate's eſtates, and though perhaps he might, after funeral expences, &c. paid, diſtribute the eſtate amongſt the wife and children; yet this was diſcretionary, and the wife and children had no intereſt in the adminiſtration; the *ſtatute of E.* 3. gives the wife no right to ſue or demand adminiſtration; all it doth is to *enable the adminiſtrator to ſue;* the 21 *H.* 8. *orders the adminiſtration to the wife, or the next of kin;* this is the firſt act that gives the wife a ſhare or intereſt in the [inteſtate's] eſtate, but that is as adminiſtratrix, and cites Hob. 191. 1 Cro. 62. 202. But though the ſtatute went ſo far as to deveſt the ordinary, and give it the wife, yet there remained many miſchiefs; for there being no diſtribution, *he that obtained adminiſtration went away with all.* So that if one was of age, and the next under age, and if by ſurprize a ſtranger obtained adminiſtration, he barred them all; or if he to whom it belonged was beyond ſea, and another got adminiſtration, he was ſtripped of all, this being the miſchief. Skin. 219. Hill. 36 & 37 Car. 2. B. R. per Pollexfen. Arg. in caſe of Palmer and Allicock.

## (Z. 7) Diſtribution. In what Caſes.

1. BARON has a *term in right of his wife;* they have iſſue a *daughter;* the *wife dies;* the baron marries again, and has iſſue a *ſon;* baron *ſurrenders, and takes a new leaſe,* and dies inteſtate; decreed the term to the daughter. Fin. Rep. 106. Hill. 25 Car. 2. Bucknall and Hicks v. Bullock.

Made perpetual by the 1 Jac. 2. cap. 17.

2. 29 *Car.* 2. *cap.* 3. *ſ.* 25. *enacts that the ſtatute* 22 & 23 *Car.* 2. *cap.* 10. *of diſtributions ſhall not extend to the eſtates of feme coverts that die inteſtate, but that their huſbands may have adminiſtration of their perſonal eſtate.*

3. If *a child dieth,* and the *mother adminiſters,* ſhe ſhall not be compellable to make diſtribution to any of the brothers and ſiſters of the inteſtate. Cites it as reſolved by Ld. Keeper North. 2 Freem. Rep. 85. pl. 94. Hill. 1682. Anon.

4. Where a *man makes an executor, to whom he deviſeth all the reſt and reſidue,* &c. and this *executor dieth before the teſtator, he that takes adminiſtration cum teſtamento annexo, ſhall* be liable to *make diſtribution of this ſurplus within the act of parliament.* Cites it as reſolved by Ld. Keeper North. 2 Freem. Rep. 85. in pl. 94. Hill. 1682. Anon.

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Barnard. Rep. in B. R. 277. 329. S. C. the Court granted a rule to ſhew cauſe, and Dr.

5. A *prohibition* was prayed to the ſpiritual court, *to ſtay a ſuit there againſt an executor for diſtribution of the ſurplus* of the teſtator's eſtate, after the debts and legacies paid; and it was inſiſted they have no authority when a will is made, and cited 5 Mod. 247. and a prohibition was granted upon debate. Gibb. 126. Hill. 3 Geo. 2. B. R. Hatton v. Hatton.

Sayer came now to diſcharge the rule. He cited many opinions in the civil law-writers, and likewiſe in books of equity, to ſhew, that executors were only conſidered as truſtees for the reſiduum. But the Court ſaid, however this notion may have obtained in Chancery where executors have had a legacy left them, yet even there it has not gone ſo far, where they have had none. However in no caſe they ſaid would

would this court ſuffer the eccleſiaſtical court to call an executor to an account for the reſiduum; and before the ſtatute of diſtributions they would not ſuffer this even in caſe of an adminiſtrator. And that they ſaid was one chief occaſion of the ſtatute, as appears by a very long caſe at the end of Raymond's Reports. Accordingly they made the rule abſolute.

6. A perſon dies inteſtate, leaving *only one child.* He ſhall have the whole perſonal eſtate within the ſtatute of diſtributions. Ch. Prec. 21. pl. 22. Hill. 1690. Palmer v. Garrard.

7. Prohibition was granted to the *delegates* to ſtay a ſuit there, &c. becauſe they *compelled an executor to make diſtribution of the ſurplus, he having* 50*l. deviſed to him by the will as a legacy;* becauſe, there being a will and an executor, the ſpiritual court cannot compel diſtribution, but only where the party dies inteſtate. Ex relatione Magiſtri Place. Ld. Raym. Rep. 86. Trin. 8 W. 3. B. R. 1696. Petit v. Smith.

5 Mod. 247. S. C. mentions it as a legacy of 5 l. left to each executor, and a prohibition was granted. —Comb. 378. S. C. and a prohibition was granted, niſi. —— Wms.'s Rep. 7. S. C. but S. P. does not appear. —— Comyns's Rep. 3. pl. 3. S. C. the Court inclined that a prohibition ſhould go. —— S. P. by Holt Ch. J. Ld. Raym. Rep. 363.

8. It is held that where a man makes a will and an executor, and the *executor dies*, an *adminiſtrator de bonis non ſhall not make diſtribution*, becauſe the party did not die inteſtate; and ſo not within the ſtatute. 2 Freem. 212. pl. 285. (b.) Hill. 1696. Anon.

9. Where a man dies, having *made* his will *and an executor, and gives him any particular ſum, as five or* 10*l. and makes no diſpoſition of the reſt* and reſidue, there the reſiduum ſhall be diſtributed to the next of kin, becauſe although he makes a will, yet he is held to die inteſtate, as to the reſiduum. 2 Freem. Rep. 212, 213. pl. 285. (b.) Hill. 1696. Anon.

10. M. *made his wife executrix, and gave* 1000*l. a-piece to his daughters, and ſome other things, and jewels to his wife.* It was inſiſted that ſo near a relation as the wife being executrix, it could not be ſuppoſed but the teſtator intended her ſome benefit, by making her executrix. But decreed, that ſhe having a particular legacy given her, ſhe ſhould diſtribute the ſurplus. 2 Freem. Rep. 263. pl. 332. Mich. 1702. Pawlett v. Lady Morley, Ld. Herbert & al'.

Ibid. ſaid that ſo it had been already ſettled even in the caſe of a wife executrix in the caſe of Randall v. Bookey. — 2 Vern. 425. pl. 386. Paſch. 1701. S. C. & S. P. per Cur. —— —— Chan. Prec. 162. pl. 134. S. C. decreed accordingly.

11. A. *died inteſtate before the ſtatute of diſtributions took place*, but *adminiſtration granted after*; his perſonal eſtate is liable to a diſtribution; the words of the act being, that *it ſhall be lawful for the ordinary, on granting adminiſtration of perſons dying inteſtate after June* 1670, *to take a bond for diſtribution.* 2 Vern. 642. Mich. 1709. Brice v. Whiteing.

12. *One covenants to leave his wife* 650*l.* he dies inteſtate, and the *wife's ſhare on the ſtatute of diſtributions comes to more* than the 650*l.* this is a ſatisfaction. 2 Vern. 709. pl. 631. Hill. 1715. Blandi v. Widmore.

13. *B.*

13. *B. having ſeveral children, gave to his eldeſt ſon (who had diſobliged him)* 10*l. and no more*, and gave to his executors a legacy, and *made no diſpoſition of the ſurplus*, and it was decreed at the Rolls, that the eldeſt ſon ſhould be let into the diſtributory part with the reſt of the children; but this decree was reverſed at the Houſe of Lords upon *the expreſs words of the will*, which *excluded the eldeſt ſon from any more than* 10*l.* Gilb. Equ. Rep. 121. Arg. Mich. 2 Geo. 1. cites Button v. Vaſhall.

Chan. Prec. 452. pl. 289. Sympſon v. Hornſby, S. C. decreed accordingly by Ld. Chancellor.

14. A. gave his wife the reſidue of his eſtate, *with power to diſpoſe thereof with the approbation of his truſtees.* The wife deviſed it by will to the plaintiff, but Cowper C. declared the deviſe void, ſhe not having the *concurrence of the truſtees*, and that the teſtator died inteſtate as to *the reſidue of his eſtate.* 2 Vern. 723. Mich. 1716. Hutton v. Simpſon.

15. A. by marriage articles *covenants to pay his wife* 1500*l. in full of dower, thirds, cuſtom of London, or otherwiſe, out of his real and perſonal eſtate*, if ſhe ſurvives him. A. dies inteſtate; per Cowper C. ſhe is tied down to accept the 1500l. and cannot come in for a ſhare by the ſtatute of diſtributions. 2 Vern. 724. Mich. 1716. Davila v. Davila.

16. A. *deviſeth to J. his daughter a legacy, and declares it to be in full of every thing ſhe could claim out of his eſtate*, and *then makes a deviſe of the reſiduum to another daughter, who dying in his life-time, he by a codicil makes a deviſe of this reſiduum to his wife* F. *to be diſpoſed of by her with the approbation of the truſtees.* A. dies; *the wife gives this reſiduum by her will without the truſtees*, &c. Cowper Chancellor ſaid, the wife not obſerving the terms preſcribed to her, this is to be taken as if the teſtator had made no diſpoſition thereof; and he dying inteſtate, it ſhall go in a courſe of diſtribution. 2dly, That J. here ſhall have her ſhare, notwithſtanding the excluſive words, for this is a new right accruing by the codicil through an accident, after the will of which the teſtator had not then any view or proſpect; but he agreed, a caſe put and determined in the Houſe of Lords, where a *man deviſed* 1*s. and no more to one of his children, and died inteſtate as to the reſiduum*; that theſe words *(and no more)* excluded that child from having any ſhare, contrary to an opinion declared by the Maſter of the Rolls. Mich. 3 Geo. Canc. MS. Rep. Sympſon v. Hutton.

17. Whitaker Serjeant moved for a prohibition to the *prerogative court*, becauſe the plaintiff and others who were executors, and had no legacies, were cited to make diſtribution of the reſidue of the teſtator's perſonal eſtate amongſt his next relations, and ſaid, that a prohibition had been granted in the like caſe between Calverly and Calverly, 12 of the late queen; but the citation appearing to be as well to exhibit an inventory, and to pay legacies, which they ought to do, as to make a diſtribution, the Court denied the motion, but ſaid, that if there was a libel, they would grant *prohibition quoad the diſtribution.* MS. Rep. Mich. 4 Geo. B. R. Fowle & al' v. Philpot.

S. P. decreed accordingly

18. A. bequeathed the ſurplus of his perſonal eſtate *to B, C, D, and E. equally to be divided ſhare and ſhare alike, and made J. S. his executor*

*executor in truſt; D. died in the life of A.* Ld. C. Macclesfield held that this legacy of a fourth part to D. became void, and was as ſo much of A.'s eſtate undiſpoſed of by the will, and could not go to the ſurvivors, nor to J. S. he being but a bare executor in truſt, and therefore muſt go to A.'s next of kin, according to the ſtatute of diſtributions, and that as to this, the executor was a truſtee for the next of kin. Wms.'s Rep. 700. Trin. 1721. Bagwell v. Dry.

by Ld. C. King. 2 Wms.'s Rep 489. Mich. 1728. Page v. Page. —And the reporter ſays, that this caſe was cited before the Ld. Talbot, and approved by him 29 Aug. 1734. Ibid.

20. A *will was begun*, and ſeveral *legacies* were given *to the next of kin, and likewiſe to the executors, and* then at the beginning of the next ſentence the will *ſtopped, and was left unfiniſhed.* Per King Ch. the teſtator having given the executors a legacy, it is moſt likely he would have given away the reſidue from them, and therefore decreed the undiſpoſed reſidue to be diſtributed according to the ſtatute of diſtributions. Gilb. Equ. Rep. 184. Hill. 12 Geo. 1. in Canc. Knewell v. Gardiner. [ 186 ]

21. A. *by will declares his intention to diſpoſe of his houſehold goods by his codicil, and deviſes the reſidue of his perſonal eſtate not diſpoſed of, nor reſerved to be diſpoſed of by his codicil, to his wife.* Afterwards the *teſtator makes a codicil, and does not diſpoſe of his houſehold goods thereby;* the houſehold goods ſhall not go to the reſiduary legatee, but according to the ſtatute of diſtribution. 3 Wms.'s Rep. 40. Trin. 1730. Davers & al' v. Dewes.

## (Z. 8) Diſtribution. How, and by whom. And to whom.

1. *BEFORE the ſtatute* 22 & 23 *Car.* 2. *cap.* 10. the *eccleſiaſtical court could not oblige the adminiſtrator to a diſtribution,* and the bonds taken by them for that purpoſe were void; reſolved. See Lev. 233. Hill. 19 & 20 Car. 2. B. R. Hughes v. Hughes.

Cart. 125 to 137. S.C. argued; and the reporter adds, that afterwards this point was ſettled by act of parliament.

2. 22 & 23 *Car.* 2. *cap.* 10. *ſ.* 4. *directs the ſurpluſage to be diſtributed as follows, viz. One* third to the wife *of the inteſtate; and the* reſidue among his children, *and ſuch as legally repreſent them, if any of them are dead,* except *ſuch children, not heirs at law, who had eſtate by ſettlement in inteſtate's life-time. But if their* * *ſhares are ſhort of the others, then to be made equal; and the heir at law to have a full ſhare, notwithſtanding any land to come to him.*

* The difference as to bringing into hotchpot was ſaid to be between perſons dying wholly inteſtate, and dying inteſtate quoad a ſurplus; in the laſt caſe it need not be brought in to intitle to a diſtributive ſhare. Ch. Prec. 170. Trin. 1701. Vachel v. Jeffries.

The occaſion of making this ſtatute (22 & 23 *Car.* 2. *cap.* 10.) was to put an end to the controverſy betwixt the temporal and ſpiritual courts. The ordinary before took bonds from the adminiſtrator to make diſtribution, and thoſe bonds were at law adjudged void, and the adminiſtrator intitled to all the perſonal eſtate. But this ſtatute takes away all the adminiſtrator's pretenſions (which he ſucceeded in before) of retaining the whole. Per Ld. C. King. 2 Wms.'s Rep. 447, 448. in caſe of Edwards v. Freeman.——S. P. by the Maſter of the Rolls. Ibid. 441.

The

The end and intent of this ſtatute was to make proviſion for all the children equal or near as could be eſtimated. It was to do what a good and juſt parent ought to do. Per the Maſter of the Rolls. Ibid. 439, 440.

3. 22 & 23 *Car.* 2. *cap.* 10. *ſ.* 5, 6. *Diſtribution ſhall be equally* between *the* widow and next of kin, *if no children; if there is* no wife, *all ſhall be diſtributed amongſt the children; if* no child, *all ſhall be diſtributed amongſt the next of kin to the inteſtate in equal degree, and their repreſentatives. No repreſentatives ſhall be admitted amongſt collaterals after brothers and ſiſters children.*

4. Huſband makes his wife executrix, and deviſed 1s. to his daughter for a legacy, and dies. *Executrix, before probate, dies inteſtate.* Whether the goods ſhall be diſtributed by the 22 & 23
[187] *Car.* 2. *cap.* 10. among the next of kin to the executrix, or to the next of kin to the teſtator, ſince ſhe dying before probate, her huſband, in judgment of law, died alſo inteſtate? the Court ſeemed to incline, that the ſtatute did extend to this very caſe, and that adminiſtration muſt be committed to the next of kin of the huſband; but if there ſhould be no diſtribution, it muſt then be according to the will of the teſtator. 2 Mod. 101. Trin. 28 Car. 2. C. B. Harris's caſe.

5. A. made his will, and his ſon executor, but *makes no diſpoſition of the ſurplus.* The ſon *dies before probate.* Per Cowper C. the perſon is dead inteſtate ab initio. 2 Vern. 633. Hill. 1708. Ball v. Smith.

6. A deviſe was to a wife of *monies to be diſtributed among her children, as ſhe ſhould think fit;* if the wife marry again, the money ſhall be equally diſtributed, becauſe the power to diſpoſe of it unequally was with intent to preſerve obedience to her, which intent fails when ſhe marries. 2 Freem. Rep. 18. Paſch. 1677.

The intent of this ſtatute was plainly to put the mother in the

7. 1 *Jac.* 2. *cap.* 17. *ſ.* 7. *If after the death of the father any of his children ſhall* die *inteſtate without wife or children* in the life of the mother, *every brother and ſiſter, and the repreſentatives of them, ſhall have an equal ſhare with the mother.*

ſame ſtate and condition with the collaterals, who before ſtood on the ſame footing with the father, ſo that whenever ſhe is intitled they ſhall have an equal ſhare with her. Per Cur. G. Equ. Rep. 190. Paſch. 12 Geo. 1. Keilway v. Keilway.

A. has a wife and three children, B, C, and D. —— J. S. by will gives 500 l. to C. and dies. C. dies. Then A. dies without having adminiſtered to C. yet the 500 l. veſted in A. by the ſtatute of diſtributions, and therefore ought not to be diſtributed as the perſonal eſtate of C. but as the perſonal eſtate of A. and then the mother and B. and D. would each be intitled to a third part. Chan. Prec. 260. Trin. 1706. Grice v. Goodwin.

If one dies without a wife leaving children they have the whole; if without children or wife leaving a father, then ſuch father has the whole; if no father but a mother, then to the mother and next of kin; if without child but a wife and a father, it goes in moieties between the wife and the father; if no father but a mother, then that moiety, (viz. the moiety remaining after the wife's moiety) between the mother of the inteſtate and his next of kin, (as brothers and ſiſters, nephews and nieces,) the repreſentatives of the deceaſed brother. Per Cur. G. Equ. Rep. 190. Paſch. 12 Geo. 1. Keilway v. Keilway —— S. C. cited Arg. Abr. Equ. Caſes, 53. —— S. C. decreed by Ld. C. King. 2 Wms.'s Rep. 344. Paſch. 1726. —— And in a note at the end of the caſe it is ſaid that this caſe was affirmed to be law. 15 May 1739. by Ld. Hardwicke, in the caſe of Stanley v. Stanley.

8. A. died inteſtate, and leaves *B. a daughter,* married to C.—*B. dies* before any diſtribution. *C. dies without adminiſtering to B.* Whether the ſhare of B. belongs to the adminiſtrator of B. or of C.? 2 Vern. 302. pl. 293. Mich. 1693. Cary v. Taylor.

9. A.

9. A. had three brothers, B, C, and D.—B. died, leaving two children. C. died, leaving three children, and D. died, leaving five children. Then A. died inteſtate. It was reſolved that diſtribution ſhould be *per capita*, and not *per ſtirpes*, and that all the children ſhould have *equal*, becauſe none take by repreſentation, but all as next of kin. Abr. Equ. Caſes, 249. Mich. 1695. Walſh v. Walſh.

10. A. on B. his eldeſt ſon's marriage with C. *covenanted*, in caſe of a ſecond marriage by B. *to pay the firſt ſon of B. and C.* 500*l.* There was a ſon and ſeveral children more of that marriage. Per Cur. the *heir muſt bring into a hotchpot* the 500l. though he is in nature of a purchaſor under a marriage-ſettlement. 2 Vern. 638. pl. 568. Hill. 1708. Phiney v. Phiney.

Equ. Abr. 249. pl. 9. S. C.——S. C. cited Equ. Abr. 251. in caſe of Edwards v. Freeman.

11. A. a freeman of London made his will, having no wife, but B. a ſon, and C. a daughter, and E. a grandſon of D. another daughter, who had married againſt A.'s conſent, and after died in A.'s life-time. A. by will, taking notice that he had given B. 400l. and C. 1000l. in full of their orphanage part by the cuſtom, *deviſes* 500*l. to E. and*, after ſome other legacies, *gives one moiety of the ſurplus of his perſonal eſtate to his ſon B.* and *the other moiety to his children and grand-children.* The Maſter of the Rolls decreed, that B. ſhould not come in for a ſhare of the remaining ſurplus, he being, by the words of the will, *ſeparated* from the other children, viz. one moiety thereof being to his ſon B. and the other to his children and grand-children, ſo that *B. was intended to have only a moiety.* Wms.'s Rep. 340, 341, 342. the 5th reſolution, Hill. 1716. Northey v. Strange. [ 188 ]

12. *And* the *children and grand-children* muſt take *per capita*, and not per ſtirpes, they *all taking in their own right*, and not by repreſentation. Wms.'s Rep. 343. the 6th reſolution. Hill. 1716. Northey v. Strange.

13. A *mother-in-law* can claim no ſhare of a child's eſtate upon the ſtatute of diſtributions; per Ld. C. Macclesfield. 2 Wms.'s Rep. 216. Hill. 1723. in caſe of Duke of Rutland v. Ducheſs of Rutland.

14. It was ſaid, that upon the ſtatute of diſtributions of 22 *Car.* 2. the *mother took all when there was no wife or child as the father did*, and before this ſtatute, if a man-child died without a wife, leaving children, they would have the whole under the ſtatute of diſtributions; Arg. G. Equ. Rep. 189. Paſch. 12 Geo. 1. in caſe of Kelway v. Kelway.

15. *Before the ſtatute of* 22 *Car.* 2. they diſtributed firſt among the *lineal deſcending line* as children; then they took the *lineal line aſcending*, as father and mother, and *then the collateral line*, as brothers and ſiſters; per Cur. G. Equ. Rep. 189. in caſe of Kelway v. Kelway.

16. If a *widow, having three children, advances, one of them with* 1000l. and dies inteſtate without having given any thing to the others; Ld. C. King ruled, that the child advanced ſhould not bring the 1000l. received into hotchpot; and ſaid, it weighed with him that this act of diſtribution was grounded upon the cuſtom

cuſtom of London, which never affected a widow's perſonal eſtate, and ſeems to include thoſe within the clauſe of *hotchpot*, who are capable of having a wife as well as children, which muſt be huſbands only. 2 Wms.'s Rep. 356. Trin. 1726. Holt v. Frederick.

17. Where a man dies, leaving a *wife* and *no child*, but a mother, and brothers, and ſiſters, the wife ſhall have one moiety by the ſtatute, and the *mother, brothers, and ſiſters*, ſhall have the other moiety equally diſtributed between them. Abr. Equ. Caſes, 253. Mich. 1727. cites it as the caſe of Kelway v. Kelway.

18. The ſtatute 22 *Car.* 2. *cap.* 10. does not hinder but that an advancement out of the perſonal eſtate to the *heir at law*, and ſo the uſe of a chattel perſonal for his life muſt be *brought into hotchpot* before he ſhall have further diſtribution; per the Maſter of the Rolls. Gibb. 285. Paſch. 4 Geo. 2. B.R. Pratt v. Pratt.

19. The ſtatute 22 *Car.* 2. *cap.* 10. directs, that the *children unadvanced ſhall, out of the ſurpluſage, be made equal to ſuch as were advanced, before any further diſtribution ſhall be made.* A portion to be raiſed out of land by a proviſion in a ſettlement upon a *contingency* of age or marriage, which had not happened at the inteſtate's death, *is an advancement*, when by the event of the contingency it becomes veſted; per the Maſter of the Rolls. Gibb. 285, 286. Paſch. 4 Geo. 2. B. R. Pratt v. Pratt.

20. Where by ſuch proviſion *ſeveral of the children*, as for inſtance, the children, by a ſecond venter, are intitled to a ſum certain, equally upon a *contingency not fallen* at the time of a bill brought for diſtribution, no conſideration ſhall be had of that ſum
[ 189 ] to *bring it into hotchpot*; per the Maſter of the Rolls. Gibb. 286. Paſch. 4 Geo. 2. B. R. Pratt v. Pratt.

21. If one dies inteſtate without iſſue, brother or ſiſter, but leaving ſeveral brothers and ſiſters children, viz. *one nephew by a brother, and three nephews and two nieces by a ſiſter*; theſe *ſhall take by capita*, and *not per ſtirpes*, becauſe all equally of kin. 3 Wms.'s Rep. 50. Trin. 1730. Davers v. Dewes.

## (Z. 9) Diſtribution. Advancement.

### What ſhall be ſaid an Advancement within the 22 Car. 2. cap. 10. to be brought into Hotchpot.

1. A. Had four daughters, B, C, D, and E. and *deviſed to B.* 1000*l.* and by the ſame will deviſed *to B, C, D, and E.* 1500*l. a-piece for portions*, which 1500l. a-piece was *to be raiſed out of lands* deviſed for that purpoſe. Afterwards B. was married in A.'s life-time, and had a portion given her by A. of 4000l. A. made M. his wife executrix, and gave her ſome legacies, but made no diſpoſition of the ſurplus, which was conſiderable. Ld. Wright ſaid, that as to the *hotchpotch*, he could ſee no reaſon againſt it,

and

and therefore the portion muſt be brought in, and ſo C. D. and E. have the benefit of it, but not the wife, and 1500l. of the 4000l. coming out of the land, there was 2500l. only to be brought into the hotchpotch. Chan. Prec. 182. Hill. 1701. Ward v. Lant.

2. A. on a *marriage treaty covenanted to leave* his wife 2000l. at his death, 2000l. to his eldeſt ſon, and 1000l. *a-piece to his youngeſt children*, and afterwards being a freeman of London, died, leaving ſeveral younger children; and it was held in that caſe, that the 1000l. a-piece to the younger children, being due only by covenant, was a debt on the perſonal eſtate, and not being to be paid till after the father's death, was no proviſion or advancement, either within the ſtatute of diſtributions, or the cuſtom of London, to bar them of their cuſtomary or diſtributory ſhares of their father's perſonal eſtate, which were greatly advanced at the time of his death; Arg. Abr. Equ. Caſes, 250. cites 3 April, 1726. Feaſt v. Feaſt.—But Ld. King ſaid, that this was a cauſe by conſent, and the queſtion very little conſidered. Ibid. 253.

3. The father agreed to give 7000l. *portion* with his daughter, *to be paid by inſtalments of* 1000*l. a year*, and the father had paid 6000l. but *died before the laſt* 1000*l. became due*, and, on a bill brought for a diſtribution of his perſonal eſtate, it was decreed by Ld. Macclesfield, and affirmed by Ld. King, that this 6000l. was not part of the advancement to be brought into hotchpotch, but that the remaining 1000l. was a debt to be paid out of the perſonal eſtate; Arg. Abr. Equ. Caſes, 251. Mich. 1727. cites [Rowland, but I ſuppoſe it ſhould be] Newland v. Shepherd.

4. But it was ſaid, Arg. on the other ſide, that the queſtion was not whether the 6000l. paid ſhould not be brought into hotchpotch, if ſhe had deſired to be let into a further ſhare, but *whether, the* 6000*l. being more than her ſhare of the whole, ſhe ſhould have the other* 1000*l.* and it was decreed that ſhe ſhould. Ibid. 252, 253. Arg. cites Newland v. Shepherd.

5. A. by marriage articles covenanted to ſettle, within ſix months after requeſt of the wife's father, *all his lands in B. for raiſing* 5000*l. for daughters portions on failure of iſſue male, payable at* 18, *or marriage, and maintenance of* 80*l. a year in the mean time.* The wife died, leaving only one child, a daughter named M. no ſettlement being made. A. afterwards married a ſecond wife, on whom he ſettled great part of the lands comprized in the articles, but without giving notice of the articles. A. died inteſtate, leaving a perſonal eſtate of 20,000l. and the ſaid M. by his firſt wife, about 11 years of age, and B. a ſon, and E. a daughter by the ſecond wife. It was decreed by Ld. C. King, aſſiſted by Raymond Ch. J. the Maſter of the Rolls, and Mr. Juſtice Price, that the 5000l. ſecured to M. though on the * *contingency* of living to 18, or being married, and which have ſince happened, muſt be brought into *hotchpotch* by M. to intitle her to a diſtribution of the 20,000l. 2 Wms.'s Rep. 435 to 449. Hill. 1727. Edwards v. Freeman.

[ 190 ] The words of the ſtatute makes no difference between a voluntary and a marriage ſettlement, but are of ſettlements in general. Per Raymond Ch. J. Ibid. 444.

* A contingent proviſion when it happens is an advancement pro tanto, as a covenant to leave a child 100 l. if living a week after my death; ſo if it were that the child ſhould be living

living one, two, or three years after the inteſtate's death. Suppoſe it were a bond inſtead of a covenant, or a mortgage inſtead of a bond, it would make no difference. Per Raymond Ch. J. and granted that it would be no proviſion till the contingency happens; and agreed that the * contingency ſhould be limited to ariſe in a reaſonable time, which being at 18, or marriage, he held a reaſonable time. Ibid.

* S. P. by Ld. C. King. Ibid. 449.

6. A *proviſion for a child by will* is not an advancement to be brought into hotchpotch, (for a caſe may happen, that as to part of the perſonal eſtate, the teſtator may die inteſtate,) neither ſhall land given by will to a younger child; for a *proviſion to be brought into hotchpotch muſt be ſuch as is made by an act in the teſtator's life-time*, and not by will; per the Maſter of the Rolls. 2 Wms.'s Rep. 440. Hill. 1727. in caſe of Edwards v. Freeman.

7. If the father ſettles a *rent out of lands* upon a younger child, it was held by the Maſter of the Rolls, that this would be an advancement. 2 Wms.'s Rep. 441. in caſe of Edwards v. Freeman.

8. If the father by *deed ſettles an annuity upon a child, to commence after his death*, this is an advancement pro tanto; cited per the Maſter of the Rolls, out of Swinb. 165. and his honour ſaid, that by the ſame reaſon a *reverſion ſettled* on a child, as it may be valued, is an advancement alſo. 2 Wms.'s Rep. 442. in caſe of Edwards v. Freeman.

S. P. by Ld. Ch. J. Raymond. Ibid. 445. and put the caſe, that the father had co-

9. A *proviſion*, within the ſtatute, for a child *need not take place in the father's life-time*, but a future proviſion is a bar pro tanto; and a portion aſſured or ſecured to a child, though in futuro, is a proviſion according to its value; per the Maſter of the Rolls. 2 Wms.'s Rep. 442. in caſe of Edwards v. Freeman.

venanted with truſtees to pay a child 100l. a week after his death, as ſuch covenant would have been plainly good, ſo would it have been a portion within the act.

A future proviſion is within this act; but an annuity for maintenance and education is not to be brought into hotchpotch. Abr. Equ. Caſes, 254. Mich. 1727. Edwards v. Freeman.

10. *Maintenance money, agreed by marriage articles*, to be paid to a daughter of a firſt marriage, in caſe of failure of iſſue male, of 80l. a year till 18, or marriage, and then to have 5000l. is not to be brought into hotchpotch, no more than what is allowed or ſecured by the parent for the *education* of the child. 2 Wms.'s Rep. 435. 449. by Ld. C. King, aſſiſted by Ld. Ch. J. Raymond, the Maſter of the Rolls, and Mr. Juſtice Price. Hill. 1727. Edwards v. Freeman.

[ 191 ] 11. A. having three children, B., C., and D. *advanced C. in part, who died, leaving iſſue.* Afterwards *A. died inteſtate.* The iſſue of C. muſt bring into hotchpotch what C. received in part of advancement, as C. muſt have done, had he been living and claimed a diſtributive ſhare; admitted by Talbot Solicitor General of Counſel for the iſſue of C. 2 Wms.'s Rep. 560. Mich. 1729. Proud v. Turner.

12. Caſe upon a bill brought by conſent for opinion of the Court was, that the late Thomas Lutwich, Eſq. having purchaſed a houſe, &c. at Turnham Green (which was *copyhold and of the cuſtom of borough-Engliſh*), afterwards died inteſtate, leaving two ſons

ſons and ſeveral daughters, and the younger ſon brought his bill for a diſtributive ſhare of his father's perſonal eſtate, &c. And it was inſiſted on behalf of the defendants, and the other children, that he ought to bring this copyhold into hotchpotch, upon the authority of the caſe of PRATT v. PRATT. Decreed in point, by Maſter of the Rolls, 11 May 1732, and two queſtions were made upon the ſtatute 22 & 23 Car. 2. cap. 10. 1ſt, Whether by the former part of ſ. 5. in the ſtatute, a younger ſon, having lands by deſcent, is to bring into hotchpotch? And, 2dly, Whether the latter part of the clauſe, which provides that the heir at law ſhall have diſtribution, notwithſtanding lands deſcended, &c. regards the heir at the common law only? And per Ld. Chancellor, as to the firſt point held, that *the youngeſt ſon having lands by deſcent, as in this caſe, was not obliged to bring them into hotchpotch;* and that the heir at law in the latter meant the heir at the common law, though that point he ſaid was not neceſſary to determine, inaſmuch as he thought upon the firſt part of the clauſe, the younger ſon by having lands by deſcent by the cuſtom was *not barred of an equal ſhare of the perſonal eſtate* with the other children. As to the caſe of PRATT v. PRATT, his lordſhip declared he had a great regard and deference to the opinion and judgment there given, but that however he muſt be guided by his own judgment and conſcience. MS. Rep. 26 March 1735. Lutwich v. Lutwich.

## (Z. 10) Diſtribution.

### Of what Things.

1. *BONDS taken in deviſee's name* ſhall be accounted part of the teſtator's perſonal eſtate diſpoſed by his will, and to be divided accordingly. Chan. Rep. 86. 10 Car. 1. Bates v. Micklethwaite.

2. Eſtate pur auter vie is not diſtributable by the 22 & 23 Car. 2. cap. 10. 2 Salk. 464. Mich. 8 W. 3. B. R. Oldham v. Pickering. Comb. 388. S. C.—— Carth. 376. S. C.——12 Mod. 103. S. C.——3 Salk. 137. S. C.——Ld. Raym. Rep. 96. S. C. accordingly.

When ſuch eſtate is limited to executors it is perſonal eſtate, and as ſuch is diſtributable within the ſtatute of diſtributions; cited to have been ſo decreed by Ld. C. Cowper, in caſe of the DUKE of DEVON AND KINTON. And Ld. C. King decreed accordingly that it was perſonal eſtate. 2 Wms.'s Rep. 381, 382. and at the bottom of the page has the following note: that however, though in the ſpiritual court an eſtate pur auter vie be not diſtributable on account of its being a freehold, yet it ſeems as if in a court of equity it ſhould be diſtributable, and that the adminiſtrator ſhould be taken to be a truſtee for general legacies, if any, and if no will, then for the next of kin; and as adminiſtration may be granted to one only as principal creditor, he ought not to go away with the reſidue of the eſtate pur auter vie as adminiſtrator.——S. P. and by Ld. C. King, eſtate * pur auter vie is diſtributable in equity. 3 Wms.'s Rep. 102. Hill. Vac. 1730. Witter v. Witter.——And by 14 *Geo. 2. cap. . an eſtate pur auter vie not being deviſed, or in part applied to the payment of debts according to the ſtatute of frauds, ſhall be diſtributed in the ſame manner as perſonal eſtate.*

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3. Lord Cowper was of opinion upon the ſtatute 22 & 23 Car. 2. cap. 10. ſ. 4. that the word *(portion) with reſpect to younger children did include an eſtate in land as well as in money*, and that this land in the computation of the eſtate to be diſtributed, was to be

added to, and computed with the other parts of it, but with reſpect to the eldeſt ſon, whatever land came to him from his father by deſcent or otherwiſe, he is to have his ſhare without any conſideration of the value of ſuch land, &c. Hill. Vac. 1715. Lloyd v. Twitſham.

4. The ſtatute of diſtributions does not break into any ſettlement which has been made by the father, but *only meddles with what is left undiſpoſed of by him*; it takes away nothing that has been given, however unequal or exceeding it may be as to the remainder left. Per Raymond Ch. J. 2 Wms.'s Rep. 443. Hill. 1727. Edwards v. Freeman.

## (Z. 11) Diſtribution.

### To whom.

1. A. *Directed* 1000 *l. to be* raiſed and *divided among five children, one* of them *dies before diſtribution.* His ſhare ſhall go to the ſurvivors, and not to his deviſee. 2 Chan. Rep. 129. 29 Car. 2. Woolſtenholm v. Swetnam.

2. A brother of the *half blood* is intitled to a ſhare of the perſonal eſtate of another brother, though of the whole, with brothers and ſiſters of the whole blood to the inteſtate, there cannot be two degrees made of the whole and the half blood. The intent of the act was to give the eccleſiaſtical court the juriſdiction in this matter, and to provide for the diſtribution of inteſtate's eſtates, which they had a long time attempted and conteſted, but were ſtill prohibited; but now this act permits them to proceed; and an information is proper by hearing civilians what their courſe is and has been. 1 Vent. 316. Trin. 29 Car. 2. B. R. and Ibid 323. Mich. 29 Car. 2. the opinion of the whole Court was that the half blood was intitled upon the new act. Smith v. Tracy.

Freem Rep. 294. pl. 345. S. C. reſolved accordingly; and the Ch. J. cited Sir George Sands's case reſolved ſo in the delegates.—— Mod. 209. Smith's caſe. S. C. the brother of the half blood muſt be accounted in equal degree.——2 Mod. 204. S. C ruled accordingly.——2 Lev. 173. S. C.——2 Jo. 93. S. C. ruled accordingly.—— In the caſe of Winchelsea (Earl) v. Norcliff. Vern 403. pl. 375. Trin. 2 Jac. 2. the Court was of opinion that where there is a brother of the whole blood, and a ſiſter of the half blood, the ſiſter ſhould have but half a ſhare; but the reporter adds a note, that the judgment in the caſes of Smith, Tracy, and Stapleton v. Sherard, and the conſtant practice of the Court has been otherwiſe. And adds a further note, that it has been ſettled in the caſe of Crooke v. Watts, upon an appeal in the Houſe of Lords, that the half blood ſhall have a whole ſhare, viz. equal with thoſe of the whole blood.——2 Vern. 124. pl. 124. Hill. 1690. Crooke v. Watts, decreed a whole ſhare to the half blood; and adds a note, that on appeal to the Houſe of Lords this decree, after arguments by civilians and common lawyers on both ſides there, was confirmed.——2 Vent. 317. Anon. S. P. in a nota, and intends the S. C.——Show. Parl. Caſes, 108. S. C. adjudged accordingly.——2 Freem. Rep. 112. pl. 124. in Canc. S. C. decreed accordingly.——S. P. by Ld. Chancellor. Barnard. Chan. Rep. 273. Hill. 1740 in caſe of Wallis v. Hodson. ——2 Chan. Rep. 300, 301. S. P. 36 Car. 2. Pullen v. Serjeant.——2 Freem. Rep. 112. pl. 124. Hill. 1689. Crooke v. Watts, the Court held that the half blood was in æquali gradu, and ought to have a whole ſhare.—— Carth. 51, Trin. 1 W. & M. in * B. R. the S. P. held accordingly in caſe of Brown v. Farndell.——Comb. 112. S. C. reſolved accordingly.——2 Vern. 124. Hill. 1690. Crooke v. Watts. S. P. decreed accordingly by lords commiſſioners in Canc. and upon an appeal to the Houſe of Lords, after hearing civilians and common lawyers on both ſides, the decree was affirmed.——Vern. 404. in pl. 375. in a nota cites S. C. ſettled in Dom. Proc.



3. *Repre-*

3. *Repreſentatives of collaterals* in 22 & 23 Car. 2. cap. 10. ſhall be intended only of brothers and ſiſters children of the party inteſtate. 2 Show. 286. pl. 282. Paſch. 35 Car. 2. B. R. Caldicot v. Smith. 2 Vern. 168. Beeton v. Darking. The Court inclined contra, but no decree; but 233. Maw v. Harding, decreed according to Caldicot's caſe. 1 Salk. 250. that brothers and ſiſters children mean inteſtate's brothers and ſiſters children. Pett v. Pett.

4. A man died inteſtate, and his next of kin were *two aunts*, but *one of them died before* him, *and left two children*, and adminiſtration being granted to the ſurviving aunt, ſhe was ordered to diſtribute a ſhare to them, and ſuch a ſhare as their mother would have, if ſhe had been living; but this was contrary to the opinion of the Ch. J. North, who would not allow repreſentations amongſt *collaterals* ſo remote. See his Lordſhip's argument, Raym. 496 to 507. Hill. 34 & 35 Car. 2. Carter v. Crawley. Freem. Rep. 296. pl. 349. Trin. 1679. C. B. S. C. ſays, the Court granted a prohibition; for by the proviſo in the act repreſentatives ſhall not extend further than brother's and ſiſter's children. But Ibid. 297. pl. 352. Trin. 1680. S. C. the Court on the caſe coming on to be argued was divided; North and Charlton for the prohibition, but Windham and Ellis e contra; et adjornatur. But Ibid. 298. pl. 354. S. C. Hill. 1680. North was for the prohibition, and Charlton and Windham againſt it. Et adjornatur.

5. A prohibition was prayed to the eccleſiaſtical court, where a perſon died inteſtate, and his next relation was a *couſin german*; and the *children of another couſin german* ſued for diſtribution; and per tot. Cur. the prohibition was granted upon the new act of parliament of this king. Freem. 298. pl. 355. in Scacc. Hill. 1680. Anon.

6. The *father had a ſon and two daughters, one of the daughters dies; the father*, intending to let the ſon have the whole advantages of the inteſtate's eſtate, *renounces the adminiſtration*, and it is granted to the *ſon*; *the other daughter* comes into the ſpiritual court, and *ſues for a diſtribution* upon the act; whereupon Pollexfen moved for a prohibition in Trinity term following. Holt ſhewed cauſe why a prohibition ſhould not go, and ſaid, that 25 Car. 2. was made in purſuance of 31 H. 8. and upon the ſtatute of H. 8. the ordinary, upon the father's renouncing, could not commit to a ſtranger, but muſt have committed to the next of kin; and that now this ſtatute cauſes a diſtribution to thoſe who have an equal right to the adminiſtration, which the daughters in this caſe have. Pollexfen on the other ſide ſaid, in this caſe there could be no diſtribution, unleſs the act gave it; and he ſaid what the act gives is at the time of the death of the party, and that none ſhall have diſtribution but who is at that time, viz. at the death of the inteſtate, intitled to it; he ſaid, that here his renouncing gave no right, and that if he come and ſue afterwards in the ſpiritual court, that this will not bar him; if the father had died before adminiſtration taken out, his executor or adminiſtrator ſhould have it. Jones ſaid, that the main intent of 25 Car. 2. was to hinder the ordinary from letting whom he pleaſed run away with the whole eſtate; a prohibition was ordered with a deſign to argue it upon a demurrer. Skin. 103. Paſch. 35 Car. 2. B. R. Tayler and Haynes. 2 Show. 285. Taylor v. Aynes S. C. argued, ſed adjornatur.

The right to diſtributory ſhares veſts immediately on the inteſtate's death.

7. If any of the *next of kin die before diſtribution*, ſuch ſhare ſhall go to his, her, or their executors or adminiſtrators, and ſhall not *ſurvive* to the next of kin of the inteſtate. 2 Chan. Rep. 374. 1 Jac. 2. Winchelſea v. Norcliff.

Per Maſter of the Rolls, and ſaid that this is according to reſolutions. 2 Wms.'s Rep. * 442. Hill. 1727. in caſe of Edwards v. Freeman. —— S. P. by Ld. Ch. J. Raymond, but he ſaid, it does in all events then veſt, becauſe if there is a poſthumous child, ſuch child ſhall be let in for its ſhare though not in eſſe at the inteſtate's death. Ibid. 446.

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8. A *grandmother* ſhall not have a ſhare *with the brother or ſiſter*; though it was argued that ſhe ſhould, becauſe ſhe is two degrees from the inteſtate; and ſo is a brother or ſiſter, computing the degrees according to the civil or canon law, viz. one degree to father, and another from him to the brother, and ſo to the grandmother, is but two degrees, viz. one to the father, and another to the grandmother. 2 Freem. Rep. 95. pl. 105. Trin. 1686. Winchelſea (Earl) v. Norcliff.

A. dies inteſtate, leaving an uncle and a deceaſed uncle's ſon,

9. *Uncle's ſon* ſhall not come in for a diſtribution with the living *uncle*. Per Lords Commiſſioners. Ch. Prec. 28. pl. 30. Trin. 1691. Maw v. Harding.

the Court inclined that the nephew was intitled to a ſhare with the uncle, but took time to conſider of it. 2 Vern. 168. Becton v. Darking. —— No repreſentation but between brothers and ſiſters to the inteſtate. 2 Vern. 233. Maw v. Harding. —— 2 Show. 286. Caldicot v. Smith accordingly.

10. If a man *dies inteſtate, leaving only one child*, ſuch child is within the ſtatute of diſtributions; and it is not caſus omiſſus; per Cur. obiter. Carth. 52. Trin. 1 W. & M. in B. R.

Barnard. Chan. Rep. 272, 273. Hill, 1740. S. P. held accordingly in caſe of Wallis v. Hodſon.

11. An *infant in ventre ſa mere*, at the time of the death of the father, was held clearly per Cur. to be intitled to a ſhare by the ſtatute of diſtributions; for he is in the eye of the law a child, and ought to be provided for as well as the reſt; and though it was admitted that a diſtribution ſhare is an intereſt veſted on the death of the inteſtate, even before the diſtribution, and ſhall go to the executor or adminiſtrator of the party, though he dies before diſtribution, yet it was not ſuch an intereſt veſted in the children born, ſo as to deprive the after-born children. 2 Freem. Rep. 230. pl. 301, Mich. 1698. Ball v. Smith.

Wms.'s Rep. 25. Trin. 1700. B. R. S. C. held accordingly. —— 3 Salk. 138. S. C. accordingly.

12. *Brother's grand-children* cannot ſhare *with brother's children*; for the inteſtate is the ſubject of the act. It is his eſtate, his wife, his children, and by the ſame reaſon his brother's children, for he is equally co-relative to all; per Cur. on a motion for a mandamus to make diſtribution, &c. 1 Salk. 250. Trin. 12 W. 3. B. R. Pett v. Pett.

—— 12 Mod. 409. S. C. accordingly. —— Ld. Raym. Rep. 571. S. C. accordingly. —— S. C. cited by Ld. C. Parker. Mich. 1719. Wms.'s Rep. 595.

So where A. died inteſtate leaving no wife nor child, but his next of kin were an uncle by the mother's ſide, and a deceaſed aunt's child, Ld. C. Parker ſaid that PETT'S CASE was a caſe in point, and that the grandchild in that caſe was a nephew to him with whom he claimed to come in for a ſhare, and ſo is the claimant here; and the uncle having demurred to the nephew's bill by which he claimed a ſhare, the demurrer was allowed. Mich. 1719. Wms.'s Rep. 594. Bowers v. Littlewood.

13. An

13. An *inteſtate having* neither father or mother, wife or children, but *only a ſiſter of his father, and two daughters of his father's brother*, a motion was made for a mandamus to the ordinary, to make diſtribution, who had granted it to his father's ſiſter. Sed per Cur. by the ſtatute 22 Car. 2. there ſhall be no diſtribution amongſt collaterals after brother's and ſiſter's children of the inteſtate; for that ſtatute is a reſtraint on the common law, and therefore ſhall not be carried farther than the letter, and after ſuch collaterals, it ſhall go to the next of kin to the inteſtate, which in this caſe was to his father's ſiſter. 3 Salk. 138. pl. 3. Pett v. Pett. Wms.'s Rep. 25. pl. 6. S. C. the whole Court declared, that among collaterals, ſaving only in caſe of brothers and ſiſters children, proximity of blood ſhall give title to the perſonal eſtate of the inteſtate.——12 Mod. 409. S. C. accordingly.——Ld. Raym. Rep. 571. the King v. Raines, alias, Pett v. Pett, Trin. 12 W. 3. S. C. held accordingly.——Comyns's Rep. 87. pl. 56. S. C. and a mandamus was denied.

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14. Among *lineals*, repreſentatives *ad infinitum* ſhould ſhare in the diſtribution; but otherwiſe among collaterals; admitted. Arg. Wms.'s Rep. 27. Trin. 1700. in Pett's caſe. Holt Ch. J. ſaid, it appears from Ridley's View of the Civil Law (pag. 63.) that the grandmother, &c. of the aſcending line to the utmoſt degree was anciently preferred before the neareſt collaterals, but that he ſaid may be altered by the ſtatute of Car. 2. which prefers the next of kin though collaterals before one though lineal that is more remote. Wms.'s Rep. 51. Paſch. 1701. in caſe of Blackborough v. Davis.

15. The *aunt* is not intitled to a diſtribution *with the grandmother*; for as by the common law, father and mother were nearer than brother and ſiſter, grandfather and grandmother are nearer than uncle and aunt, the *grandmother* in this caſe *is the root of the kindred, whereas the aunt is only a branch*; and the grandmother is in the place of the mother; if one had died without wife or child, his mother had all (before 1 Jac. cap. 17.), and his brothers and ſiſters nothing; but the father ſurviving has all at this day, and this act was to prevent the mother's carrying all to another huſband. 1 Salk. 251. Trin. 13 W. 3. B. R. Blackborough v. Davies. Till the time of H. 2. or 3. the father and mother were not excluded as to the real eſtate, but they never were excluded as to the perſonal. Ibid. —12 Mod. 615 to 626. Hill. 1701. S. C.——Wms.'s Rep. 41 to 53. Paſch. 1701. S. C.——Ld. Raym. Rep. 684. 686. S. C. the Court held, that the grandmother is as near as the aunt; for in this caſe in deſcent of lands it would be a mediate deſcent, and the ſame medium to both, viz. the father; and the grandmother ſeems to have the advantage, becauſe ſhe is of the right line, and the aunt of the collateral line. And Sir Barth. Shower cited a caſe between BURTON AND SHARP, in the laſt Trin. term, where an adminiſtration was ſued to be granted to the great grandmother; and the aunt moved for a prohibition in C. B. to ſtay the ſuit in the ſpiritual court, and it was denied. Chan. Prec. 527. Hill. 1719. S. P. Woodroffe v. Wickworth; and ſays it was ſo ſettled in caſe of Welſh v. Duppa.

16. I give *unto my daughter A. all my goods and plate, 1500l. to my ſon B. and 10l. and no more to my ſon W. and 10l. and no more to my wife's daughter P.* and made C. and D. executors, and gave them 100l. each, but makes no diſpoſition of the reſidue. Decreed, that it ſhall go in a courſe of adminiſtration, but decree reverſed; for it is plain that *W. and P. were to have 10l. and no more.* MS. Tab. March 8, 1706. Vachel v. Breton.

17. The next of kin to an inteſtate were a *grandfather by the father's ſide, and a grandmother by the mother's ſide*. They ſhall take in equal moieties by the ſtatute of diſtributions, as being in equal degree. Decreed at the Rolls, and Sir Joſeph Jekyl was ſo clear

in the point, that he would not ſuffer it to be debated. Wms.'s Rep. 53. cites 13 May 1723. Moor v. Barkham.

18. A *papiſt* may take a perſonal eſtate by the ſtatute of diſtributions, in the caſe of one dying inteſtate; it is the act of the law, it is the legiſlature that gives theſe diſtributory ſhares to the widow and next of kin; it is a ſucceſſion ab inteſtato to a perſonal eſtate, ſimilar to a deſcent of land, where an heir, though a papiſt (as here) if above the age of 18 years and ſix months, may inherit. Beſides, the intent of the ſtatute of diſtributions was, that the adminiſtrator ſhould ſell all the perſonal eſtate of the inteſtate, turn it into money, and diſtribute it; now it would be inconſiſtent that the papiſt ſhould have a ſhare of the money left by the inteſtate, but not of the money raiſed by the adminiſtrator out of the inteſtate's eſtates. 3 Wms.'s Rep. 48, 49. Trin. 1730. Dayers & al' v. Dewes & al'.

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## (Z. 12) Diſtribution.

### Where the Right ſhall be ſaid to be veſted.

Where a perſon thus intitled to a diſtributory ſhare dies within a year after the inteſtate, in ſuch caſe, though by the ſtatute no diſtribution is to be made within a year, yet the ſhare of the deceaſed perſon will be an intereſt veſted, tranſmiſſable to his executors or adminiſtrators; for in this ſenſe the ſtatute makes a will for the inteſtate, and it is as if a legacy was bequeathed payable a year hence, which would plainly be an intereſt veſted preſently. Nay, where one died without wife or iſſue and inteſtate, leaving a father who alſo died before taking out adminiſtration, or altering the property of the eſtate; though in that caſe there was only one who could claim as next of kin, and ſo literally and ſtrictly ſpeaking there could be no diſtribution, yet by the ſtatute the right to the inteſtate's perſonal eſtate veſted in the father, and conſequently belonged to his executors or adminiſtrators, and not to the next of kin to the firſt inteſtate, who in ſuch caſe happened to be a different perſon. 3 Wms.'s Rep. 49, 50. in a note of the reporter, cites Hill. 1708. Grice v. Grice. Per Ld. Cowper. ——— And note, Mr. Vernon upon this occaſion told the reporter it had been twenty times determined in equity, that where there is only one perſon intitled to take the perſonal eſtate of the inteſtate as next of kin, the ſtatute veſts a right in that perſon, making him as a legatee of the party deceaſed. Ibid.

1. A. *Dies inteſtate, without brother or ſiſter, his mother living. She makes her will, and* makes *B. her executor and reſiduary legatee, and dies within a week after her ſon, and before ſhe had taken out adminiſtration to him.* The *brother of the mother takes out adminiſtration to the ſon*, as his uncle and next friend; the *executor of the mother brings a bill againſt the uncle* and adminiſtrator of the ſon, *to have an account* of the perſonal eſtate of the ſon, *in right of his teſtatrix, who was intitled to it by the ſtatute of diſtributions.* Cowper C. ſaid, the adminiſtrator of the ſon is only a truſtee for the next of kin to the inteſtate, who are intitled to a diſtribution by the ſtatute, and that in this caſe was the mother, the ſon dying without father, brother, or ſiſter, and this *is an intereſt veſted in the mother, though ſhe died before adminiſtration taken out* to the ſon, and ſhall go to her executor and reſiduary legatee; and decreed accordingly for the plaintiff. MS. Rep. Trin. 2 Geo. Canc. Jackſon v. Prudehome.

## (Z. 13) Diſtribution.

### By the Court on a Deviſe.

1. DEVISE *after debts and legacies paid, the reſidue amongſt his kindred according to their moſt need;* this is to be extended according to the act for better ſettlement of inteſtate's eſtates. 2 Chan. Rep. 147. 30 Car. 2. Carr v. Bedford.

2. A freeman of London deviſed his part thus, *viz. I intruſt it with my wife, and to give it amongſt my children as ſhe ſhall think fit.* The *teſtator had a child by a former venter, to whom the mother-in-law gave a ſmall part,* and the reſt amongſt her own children. The Court decreed that the diſtribution is unjuſt. Fin. Chan. Rep. 354. Paſch. 30 Car. 2. Oaker v. Parrot.

3. Deviſe to the wife, *and hoped ſhe would leave it to his ſon.* Her [ 197 ] ſecond huſband granted the legacies deviſed away. Son ſued for relief, but was diſmiſſed; for it was no truſt for the ſon. Cited per Finch C. Chan. Caſes, 310. Hill. 30 & 31 Car. 2. in the caſe of Civil v. Rich.

4. A. deviſed land *to B. for* 80 *years, if ſhe lives ſo long, then to truſtees, to ſell for payment of debts.* Decreed, the lands to be ſold for payment of debts, and to pay B. *ſeven years purchaſe for her eſtate for life,* in ſuch part of the lands which ſhall be ſold for the purpoſe aforeſaid. Fin. Rep. 414. Hill. 31 Car. 2. March v. Fowke & al'.

5. An eſtate was deviſed to a man *to diſtribute the ſame amongſt his nephews and nieces as he ſhould think fit,* and one of the nieces, to whom nothing had been appointed, brought a bill that ſhe might have an equal ſhare of the eſtate, and was diſmiſſed. Vern. 356. Hill. 1685. Swetnam v. Woolaſton.

6. A. *directs his lands ſhall deſcend to his three daughters, in ſuch ſhares* and proportions *as his wife by deed ſhall appoint.* She makes a very unequal diſtribution. Whether equity will relieve againſt it? Vern. 355. Hill. 1685. in caſe of Wall v. Thurborne. Ibid. 414. pl. 392. Mich. 1686. S. C. the Court declared that the caſe was proper and relievable in equity, and it is diſcretionary in the Court whether to do it or not, and took time to conſider of it, and to be attended with precedents.

7. A. deviſed ſome legacies, and then gave the *reſidue of his perſonal eſtate to and among his kindred, according to their moſt need,* and deſired that a *ſpecial regard ſhould be had to W. his ſiſter's ſon.* The Court thought the act of diſtributions the beſt rule, as to limiting the extent of the word *kindred,* but the order took in the nephews and nieces, together with their mothers, and directed that W. ſhould have ſomething conſiderable, and the executor afterwards to give moſt where was the moſt need, and the maſter to ſee right done. 2 Chan. Rep. 146. 30 Car. 2. Carr v. Bedford.

8. A deviſe of the ſurplus was to teſtator's *poor kindred at the diſcretion of his executors.* Decreed to the poor kindred according to the

the act for diſtributing inteſtate's eſtates, and no farther, and to be diſtributed in ſuch ſhares and proportions as the executors ſhould think fit. 2 Chan. Rep. 395. 2 Jac. 2. Griffith v. Jones.

9. The huſband deviſed perſonal eſtate to his wife, *upon truſt and confidence that ſhe ſhould not diſpoſe thereof but for the benefit of her children.* She made a very unequal diſtribution; but decreed an equal diſtribution. Vern. 66. pl. 63. Mich. 1682. Gibſon v. Kinven.

10. Money bequeathed to A. for life, and if ſhe died in the life of B. her huſband, then to go *to the children of M. in ſuch ſhares as A. ſhould adviſe.* Some of M.'s children died, leaving iſſue, and then A. dies in the life of B. making no appointment. Decreed a diſtribution among M.'s children and their repreſentatives *per capita*, and not *per ſtirpes*. 2 Vern. 50. pl. 49. Paſch. 1688. Crook v. Brooking.

11. A deviſe was made in theſe words: *I give to my daughter H. 1000l. to be ordered and diſpoſed by her for the benefit of her children, as ſhe pleaſes, without giving an account to any body. H. died, and made no diſpoſal.* The defendant, her huſband, took adminiſtration, and the children, the plaintiffs, brought their bill for this 1000l. and the ſole queſtion was, whether there was any intereſt veſted in the children by this deviſe? for if there was not, then it belonged to the defendant, who was huſband and adminiſtrator to the wife; and it was inſiſted for him, that it being given to the wife by the
[ 198 ] firſt words of the will, the huſband became intitled to it. The cauſe was referred, and ſo the Court gave no opinion, but ſeemed doubtful in the caſe. 2 Freem. Rep. 110. pl. 121. March 1689. Hillier v. Hillier.

12. A man gave a *perſonal eſtate to his wife, upon truſt that ſhe ſhould diſpoſe of it among her children in ſuch manner as ſhe ſhould think fit*, and ſhe would have made an unequal diſtribution of it, and the Court ordered her to give it amongſt them equally, there being no proof of any miſbehaviour in any of them. 2 Freem. Rep. 199. in pl. 273. Trin. 1694. cited as the caſe of Baker v. Barrett.

13. A. makes two of his daughters his *executors*, and gives 400*l.* *by them to be diſtributed among themſelves, and their brothers and ſiſters, according to their neceſſity, as in their diſcretion* they ſhould think fit; per Wright K. Decreed a double ſhare to the plaintiff, the heir, looking on him to ſtand moſt in need thereof, and confirmed his former decree. Affirmed in parliament. 2 Vern. 420. Paſch. 1701. Warburton v. Warburton.

The deviſe was for the uſe of his relations. It was agreed that the ſtatute of diſtributions was the rule to conſtrue ſuch deviſes in this Court to relations,

14. A. deviſed 15l. a-piece *to each of his father's and mother's relations*, and makes B. executor, and C. reſiduary legatee. B. paid 15l. *to a couſin-german, and 15l. a-piece to her four children.* C. inſiſted the diſtribution ought to have been guided by the ſtatute, and the children ſhould have had nothing. Ld. Wright allowed the payment good, and took notice of the caſe of Arnold v. Bedford, where, though it is mentioned in the order that the deviſe to the *kindred* ſhould be governed by the ſtatute of diſtributions of inteſtate's eſtate, yet there the children of brothers and ſiſters were let in to receive a ſhare in the life of their parents, which is not allowable

allowable on a diſtribution under the ſtatute. 2 Vern. 381. Trin. 1701. Jones v. Beale. and Ld. Cowper approved it.

Chan. Prec. 401. Paſch. 1715. Roach v. Hammond.

15. A. has ſix younger children, and bequeathed 1000l. to each at 21, and if any of them die before 21, the legacy of ſuch child *to be diſpoſed of to one or more of the ſurvivors, in ſuch manner as his executrix ſhall think fit*, and made his wife executrix. One dies before 21. Per Wright K. this power is ſpecial and particular, and not like the caſes of a general truſt to diſtribute *among the younger children at diſcretion*, there an indiſcreet diſpoſition may be controlled by a court of equity; but this is *caſus proviſus*, it is expreſsly provided that ſhe may give all to one as ſhe had done, and decreed the appointment to ſtand. 2 Vern. 512. Mich. 1705. Thomas v. Thomas.

## (Z. 14) Diſtribution by the Cuſtom of York and London, and who within the Cuſtom.

1. IF a citizen *dies without wife or children*, then the ſtatute 22 & 23 Car. 2. cap. 10. ſhall make a diſtribution; per Dolben J. 2 Show. 175. pl. 170. Hill. 33 & 34 Car. 2. B. R. in caſe of Percival v. Criſp. And agreed by all that the heir is not excluded, but ſhall come in for his part, and ſhall have it by the cuſtom of London. Per Dolben J. 2 Show. 176. in caſe of Percival v. Criſp.——For then there is no cuſtom. Per Pemberton Ch. J. Ibid.——S. P. per tot. Cur. 2 Jo. 204. Percival v. Criſp.——Skinn. 26. S. C. & S. P. agreed.

2. If a *freeman* of London *gives legacies* by his will, and *names no executor*, whereupon letters of adminiſtration are granted cum teſtamento annexo, it is plainly out of the ſtatute of diſtributions; agreed. 2 Show. 176. Hill. 33 & 34 Car. 2. B. R. Percival v. Criſp. [ 199 ]

3. A *debt* in law or equity ſhall come in and be *deducted in the firſt place* and leſſen the widow's moiety, but a *legacy* cannot be ſo deducted. 2 Chan. Caſes, 84. Hill. 33 & 34 Car. 2. Popley v. Popley.

4. *If a freeman of London* dies inteſtate leaving a * *wife and no child*, by the cuſtom of the city, a widow ſhall have her widow's chamber and a moiety of the reſt of the perſonal eſtate, and the adminiſtrator the other moiety, and that not ſubject to a diſtribution by the ſtatute. Vern. 133. pl. 122. Hill. 1682. Matthews v. Newby. Ibid. in a nota ſays, that in the caſe of STAPLETON v. SHERRARD, in 1687. in a like caſe on the cuſtom of York, Ld. Jeffries decreed the other moiety diſtributable according to the ſtatute.——Vern. 465. pl. 446. Stapleton v. Sherrard decreed accordingly.

* In ſuch caſe the cuſtom of London gives no directions as to the other moiety belonging to the inteſtate, and therefore that is wholly under the direction of the ſtatute of diſtributions; but the cuſtom of the province of York extends to give ſuch moiety to the next of kin to the inteſtate. Ch. Prec. 327, 328. Hill. 1711. in caſe of Whitehill v. Phelps.——Gilb. Equ. Rep. 81. S. C. in totidem verbis.

5. By the cuſtom of the province of York, a daughter once advanced by her father in his life-time is excluded from all further benefit

benefit of his perſonal eſtate; but in the principal caſe it appearing that *all the children were advanced in his life*, and ſo the eſtate wholly exempted out of the cuſtom, it ought now to go in a courſe of adminiſtration, and be diſtributed according to the act for ſettling of inteſtate's eſtates. Vern. 200. Mich. 1683. Goodwin v. Ramſden.

6. In Chancery it was held and declared per Ld. Jeffries, that if a *freeman of London* dying leaves a *wife and grandchildren*, the grandchildren ſhall not have the benefit of the cuſtom of an orphanage part, but the wife ſhall have a moiety as if no child at all, and this on the report of the recorder. 2 Show. 467. Paſch. 1 Jac. 2. B. R. Anon.

4 & 5 W. & M. cap. 2. takes away the cuſtom of the province of

7. 1 *Jac.* 2. *cap.* 17. *ſ.* 8. *Such part of any inteſtate's eſtate within the city of* London, *or province of* York, *as any adminiſtrator has by virtue only of being adminiſtrator, ſhall be ſubject to diſtribution as in other caſes, and the cuſtom ſhall not extend to it.*

York, and gives power to diſpoſe of their perſonal eſtates by will, but excepts the city of York and Cheſter, 7 Ann. cap. 5. ſ. 1. repeals the proviſo as to the city of York.

8. Inhabitant in the province of York dies *without iſſue inteſtate leaving a widow*; per North K. the whole is governed by the cuſtom, and no part of the inteſtate's eſtate within the ſtatute of diſtributions. Vern. 314. Paſch. 1685. Stapleton v. Sherrard.

S. P. and that it had been ſettled by the then preſent Ld. Chancellor,

9. *Grandchildren* are not intitled to a cuſtomary ſhare of a freeman's perſonal eſtate by the *cuſtom of London*. Vern. 397. Paſch. 1686. Fowke v. Hunt.

where a deed by way of proviſion made by a grandfather for a grandchild in order to introduce him into his deceaſed father's place was ſet aſide, as made in fraud of the cuſtom againſt the ſurviving children; ſaid by the counſel and agreed by the Court. Chan. Prec. 470. Paſch. 1716. Northey v. Burbage.——Wms.'s Rep. 341. Hill. 1716. S. P. admitted by counſel, Northey v. Strange.——2 Salk. 426. S. P.

10. A freeman of *London dying within the province of York*, the cuſtom of London in the diſtribution of his perſonal eſtate ſhall controul the cuſtom of the province of York. 2 Vern. 49. Paſch 1688. Cholmly v. Cholmly.

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1 Vern. 15. S. C. decreed by Finch C. that the wife was barred of her diſtributive as well as cuſtomary ſhare. Reverſed per North K. but affirmed by Jeffries C.

11. An inhabitant within the *province of York* made a ſettlement on the wife *in bar of her cuſtomary part*, or what ſhe might otherwiſe claim out of the perſonal eſtate. He afterwards died inteſtate leaving her and two children. Per Finch, the huſband is in nature of a purchaſor of his wife's ſhare, and without doubt might have diſpoſed of it by will, and what he might have diſpoſed of by will the ſtatute has diſpoſed for him, and is in nature of a will for all inteſtates, as was reſolved in the caſe of Travel v. Peacock, and in Ryder's case, but no order in the principal caſe. 2 Vern. 263. pl. 248. Paſch. 1692. Benſon v. Benſon.

12. An inteſtate being an inhabitant in the *province of York* has a *ſon and daughter*, but no widow. The daughter had a *portion* on marriage in lieu of what ſhe might claim by the cuſtom. This being ſaid to be in bar of her cuſtomary part ſhall be no bar to

her diſtributory part on the ſtatute of diſtributions, nor muſt ſhe bring her portion back into *hotchpotch*. 2 Vern. 274. pl. 259. Trin. 1692. Gudgeon v. Ramſden.

13. Land is ſettled *on marriage* to A. for life, remainder as to part to his wife for life, *remainder of the whole to the firſt, &c. ſon in tail*, remainder to his own right heirs; by cuſtom of *York the eldeſt ſon is excluded* by this ſettlement from having any ſhare of his father's perſonal eſtate. 2 Vern. 375. pl. 337. Trin. 1700. Conſtable v. Conſtable.

12. If a freeman *of London* dies *inteſtate, leaving wife and children*, the cuſtom affects only two thirds, and the remaining third is ſubject to the ſtatute of diſtribution, and ſo dividing the whole into ninths, four ninths belong to the wife, and five ninths belong to the children. 2 Salk. 426. Trin. 1 Ann. B. R. Anon.

The third part belongs by cuſtom to the adminiſtrator, and is not ſubject to diſtribution by 22 Car. 2. cap. 10. 2 Jo. 204. Percival v. Criſp. ——— It was agreed as an undoubted rule, that the inteſtate's third part ſhall go according to the ſtatute ofdiſtributions, and is not at all under the controul of the cuſtom. Ch. Prec. 499. pl. 310. Trin. 1718. Walſam v. Skinner. ——— Gilb. Equ. Rep. 153. S. C. in totidem verbis.

13. *An after-born child* ſhall come in with the reſt for a cuſtomary ſhare of a freeman of London's perſonal eſtate. Ch. Prec. 499. Trin. 1718. Walſam v. Skinner.

Gilb. Equ. Rep. 155. S. C. in totidem verbis.

## (Z. 15) Diſtribution.

### Compelled. How. And by what Court.

1. ADminiſtrator may he ſued in the ſpiritual court *to account*, but not to make a *diviſion* of the goods. Noy, 24. Mountague v. Clerk.

Lanch v. Roſſe. S. P. cited in Took's caſe. Noy, 24. — But an executor of adminiſtrator ſhall not be compelled to account for the goods of the inteſtate. Noy, 28. Sparrow v. Norfolk.

2. Adminiſtration of the *goods of the daughter* was granted to the next of kin, i. e. *to the mother;* and now adminiſtrator was ſued in the ſpiritual court to account, and that the monies which remains ſhould be diſtributed between 12 others of the next of blood to the inteſtate, and a prohibition was prayed by Croke, becauſe the ſtatute intends that the next of blood ſhould have only the benefit of the goods that remain; but the prohibition was denied per Dod. and Haughton, becauſe the books are frequent that the adminiſtrator *may be compelled to account*. Roll. Rep. 358. pl. 10. Paſch. 15 Jac. B. R. Sharp v. Simpſon. [ 201 ]

3. S. Adminiſtrator of M. L. his ſiſter, was ſued in the ſpiritual court, to make diſtribution of the goods of the inteſtate, pretending that all the debts and legacies of the inteſtate were diſcharged, and a great *ſurpluſage* was remaining, which was diſpoſable at the pleaſure of the ordinary, and to be divided amongſt the friends of the inteſtate. Reſolved per tot. Cur. that a prohibition

bition ſhould be granted, becauſe the abſolute intereſt in the goods is in the adminiſtrator, and the adminiſtration being once committed, the *ordinary hath nothing to do with them.* Cro. C. 201 pl. 4. Mich. 6 Car. B. R. Levanne's caſe.

Litt. Rep. 21. Fotherlye's caſe, S. C. and a prohibition was granted.

4. The *adminiſtrator* of F. *was ſued in the eccleſiaſtical court, to make diſtribution of ſome part of the perſonal eſtate to the ſiſter and heir of the inteſtate.* A prohibition was prayed upon a ſurmiſe, that by the law of the land, adminiſtration being committed, the ordinary hath no power to intermeddle with making diſtribution of the goods of the inteſtate to the children or kindred; it was much inſiſted upon, that the prohibition was not grantable, for that the uſual courſe hath always been for the ordinary, after debts paid, to give order for the diſtribution of part of the goods to the children or kindred. Hutton J. ſaid, that divers prohibitions had been granted in ſuch caſes, for the adminiſtrator is only chargeable, and the ordinary hath nothing to do to intermeddle with the goods after the adminiſtration is committed, and therefore, upon divers precedents ſhewed of the like caſes, a *prohibition was granted.* Cro. C. 62. pl. 6. Mich. 22 Car. C. B. Fotherbie's caſe.

5. Eccleſiaſtical court cannot make a *diſtribution* of *remainders of terms.* 2 Ch. Rep. 59. 22 Car. 2. in caſe of Hunt v. Jones.

Freem. Rep. 283. pl. 327. Miller's caſe. S. C. the inteſtate had three daughters, A., B., and C. and the wife adminiſtered and died, and made A. and B. (the plaintiffs) her executrixes,

6. A *prohibition* was moved for *to a ſuit in the Bp. of Exeter's court againſt the executors of an adminiſtrator for diſtribution:* 1ſt, Becauſe it was *ſuggeſted that obligations that were in their names as obligees were in truſt for the adminiſtrator their teſtator.* 2dly, Becauſe *other bonds were altered by the adminiſtrator, and new ones taken in the adminiſtrator's name as obligee;* and a prohibition was granted; for, 1ſt, This is a truſt, which is a matter in equity, whereof they have no conuſance; and, 2dly, Though the adminiſtrator might be ſued for diſtribution, notwithſtanding the taking new bonds in his own time, yet he dying, his executor or adminiſtrator cannot be ſued; as a feme indebted makes the huſband liable during coverture, yet does not make his executor liable after. 3 Keb. 358. pl. 30. Mich. 26 Car. B. R. Miller v. Potter.

who had ſeveral bonds in their own names, and ſome in their mother's name, to whom they were executrixes, and they alſo took out adminiſtration de bonis non of their father, and that ſome bonds in their father's name were debts owing to the father, but the mother had altered the property and taken them in her own name, and C. ſued for diſtribution of theſe debts; as to the firſt part a prohibition was granted; but as to the other part the Court would not deliver any opinion, it being on the conſtruction of a new act of parliament, and the Court not being full.

7. Bill againſt adminiſtrator and others to have *diſtribution* of the inteſtate's eſtate, according to 27 Car. 2. which ſtatute defendant pleaded, and that by that ſtatute the ordinary is made the judge to diſtribute, and is appointed to take ſecurity, and therefore the plaintiff ought to ſue there, and not here. Finch C. over-ruled the plea, and ordered defendant to anſwer. 2 Chan. Caſes, 95. Paſch. 34 Car. 2. Pamplin v. Green.

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8. A *bill* was preferred *for a diſtribution* upon the act concerning inteſtate's eſtates, *and to diſcover a truſt of ſome money put out by the defendant, for the inteſtate in his own name.* Upon a demurrer the

Court reſolved that they would give no relief, ſo as to make a diſtribution, becauſe it was an authority given by act of parliament to the eccleſiaſtical judges, and limited particularly to them; and although there were no negative words in the act, yet it being a thing newly created, which was not at common law, they would not hold plea of it any farther than to diſcover the truſt or fraud, in caſe there were any. But it was alleged that the Ld. Chancellor does conſtantly decree a diſtribution. Freem. Rep. 330. pl. 411. Mich. 1682. in Scacc. Manning v. Manning.

9. A *bill* in Chancery *is very proper for a diſtribution*, there being no negative words in the act of parliament, and therefore the Ld. Keeper over-ruled a demurrer. Vern. 134. pl. 122. Hill. 1682. Matthews v. Newby. Ibid. pl. 123. Howard v. Howard. S. P. and the demurrer over-ruled accordingly. —— Where a will is made the ſpiritual court cannot compel a diſtribution of the ſurplus after debts and legacies paid. Gibb. 120. pl. 11. Hill. 3 Geo. 2. B. R. Hatton v. Hatton.

10. If the eccleſiaſtical court grant adminiſtration to one that is more remote, and refuſe him that is neareſt of kin, on ſuggeſtion of this matter a *mandamus* is grantable. Cumb. 454. Mich. 9 W. 3. B. R. Gray v. Tench. Sty. 7. Mich. 27 Car. Luſkings v. Carver, S. P. —— Lev. 187. Trin. 18 Car. 2. C. B. in caſe of Offley v. Beets. S. P. — But where there is a controverſy, as upon pretence of a will, &c. no mandamus will be granted till the controverſy determined. 5 Mod. 375. Mich. 9 W. 3. Anon. —— Farr. 143. Steward v. Eddy. —— Arg. Gibb. 123.

11. There never is a diſtribution ordered by the *eccleſiaſtial court*, but where the party dies inteſtate, or the will directs it; but *Chancery* does ſometimes inforce a diſtribution where the *will does not direct it*. Per Holt Ch. J. 12 Mod. 566. Mich. 13 W. 3. Anon.

12. Per Cur. any perſon that is intitled to diſtribution within the ſtat. 22 Car. 2. cap. 10. is by conſequence *intitled to ſue the adminiſtrator in the eccleſiaſtical court to make good his account by proofs, and examination upon oath*, as a legatee was againſt an executor before the ſtatute. 1 Salk. 251. pl. 3. Hill. 6 Ann. B. R. Canterbury Archbiſhop v. Willis.

## (A. a) The Power of Executors before Probate.

Fol. 917.

[1. IF an *obligee releaſe to the executor of obligor* before probate of the will, this is a good releaſe *if he proves the* will *afterwards*. Paſch. 1 Ja. B. per Cur.] But if A. releaſes and after takes letters of adminiſtration, it is not good. Palm. 411. Barefoot's caſe. —— Yet ſee 1 Salk. 295. where A. buried B. and J. S. conſented that A. ſhould have a horſe of B.'s in part of ſatisfaction, and after J. S. had adminiſtration granted to him of B.'s goods, and brought trover for the horſe, and it was adjudged for A. againſt the opinion of Holt Ch. J. Whitehall v. Squire. —— Carth. 103. S. C. —— * Skinn. 274. pl. 2. Paſch. 2 W. & M. in B. R. the S. C. adjudged accordingly. —— 3 Mod. 276. S. C. held accordingly.

* [ 203 ]

[2. If an executor, before probate of the will, *brings* an action of *debt upon a bond* due to him as executor, but when he declares he ſhews it to the court proved, this being *proved after the action brought*, yet the action is well brought, becauſe he was executor before S. C. cited Vent. 370. in caſe of Duncomb v. Walter. —— S. C. cited 3 Lev.

before probate, though by law he is not permitted to ſue before probate; yet this being proved, the impediment is removed ab initio; for he, by *ſhewing of the will to the Court*, ſatisfies the ceremony which the law requires, which he has done ſo as the law requires. Mich. 16 Car. B. R. held per Barkley in writ of error upon ſuch judgment in the Marſhalſea court, where this was ſo adjudged upon a ſpecial verdict.]

58. in S. C. ——Skinn. 87. S. C. cited and admitted to be law by Saunders Ch. J. and the counſel of the other ſide in S. C.——Raym. 481. cites S. C.——So it is if he bring action for treſpaſs done in teſtator's life-time, ſo as teſtator himſelf was intitled to the action, and it grows not upon the executor's own poſſeſſion. Went. Off. Ex. 35.

3. Executors *brought debt*, and becauſe it appeared that they *had not proved their teſtament*, it was awarded that they take nothing by their writ. Br. Executor, pl. 49. cites 7 H. 4. 18.

Executor cannot bring action before the teſtament proved. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.

4. Termor *deviſes his term to A. whom he makes executor*, and dies. A. enters before probate, and occupies the land for a year and more without any probate. Ruled, that the property of the term was in A. and lawfully executed by his entry, and his adminiſtrator ſhall have it. D. 367. a. pl. 39. Mich. 21 & 22 Eliz. Anon.

5. Executor may *releaſe* any action before probate; adjudged. 5 Rep. 28. a. Paſch. 1 Jac. C. B. Middleton's caſe, alias Middleton v. Rimot.

Pl. C. 281. a. S. P. accordingly, in caſe he afterwards proves the will; for this makes the releaſe good and perfect.——Co. Litt. 292. b. S. P.

6. But he cannot *bring action* before probate. 5 Rep. 28. a. Paſch. 1 Jac. C. B. Middleton's caſe.

Pl. C. 281. a. S. P. becauſe he cannot ſhew the will proved under the ſeal, but the relation after the probate takes away all the imperfection.——9 Rep. 38. a. S. P.——Co Litt. 292. b. S. P.——Raym. 481. Arg. S. P. cites Middleton's caſe.——10 Mod. 171. cites ſame caſes.——S. C. cited Arg. 2 Mod. 148.——Hutt. 31. Trin. Jac. 2. S. P.

7. *Two executors prove* the will; the *third refuſes*; yet he may releaſe. 5 Rep. 28. a. Paſch. 1 Jac. C. B. Middleton's caſe.

8. *Actions ariſing upon the executor's own poſſeſſion* may be maintained by him before probate, as for goods of teſtator taken from him, or a treſpaſs done upon the leaſe-land, or a diſtraining or impounding goods or cattle; ſo of actions of *treſpaſs*, or *replevin*, or *detinue*. Went. Off. Ex. 34, 35.

9. Executor before probate may *ſeize goods* of teſtator, and may * *enter the houſe of the heir* (if not locked) for that purpoſe, and to *take the ſpecialties of debts*, and generally may do all things belonging to the office of executor, except bringing of actions and proſecution of ſuits. Went. Off. Ex. 33.

* So as the door be open, or at leaſt the key be in the door, and this I underſtand of the door of each room. Went. Off. Ex. 92.——If the goods are not removed in convenient time the heir may diſtrain them damage feaſant. Went. Off. Ex. 92.

[ 204 ] 10. He may *pay or receive debts*, *releaſe*, and *take acquittances*. If day of payment of a bond happen before probate, it muſt be made to or by an executor, upon pain of forfeiture as if the will were proved. Went. Off. Ex. 34.

11. He

11. He may *ſell or give away* any of the goods or chattels, and may *aſſent to a legacy* before probate, and though he dies before probate, all the acts above will ſtand good. Went. Off. Ex. 34. He may aſſign any part of the perſonal eſtate before probate. Per Ld. C. Macclesfield. Wms.'s Rep. 768. Mich. 1721. in Comber's caſe.

12. Executor of teſtator who had a grant of the *next avoidance* of a church may maintain a *quare impedit* before probate. Went. Off. Ex. 35.

13. The debtors to a teſtator's eſtate were *enjoined not to pay any money* to a pretended executor till his title to the executorſhip were ſettled in the ſpiritual court. Chan. Caſes, 75. Paſch. 18 Car. 2. Smallpiece v. Anguiſh.

14. Executor *not intitled to the perſonal eſtate till* the will is proved by him, and he takes on himſelf the execution thereof. Fin. Rep. 88. Hill. 25 Car. 2. in caſe of Blondell v. Pannet.

15. An *executor brought* an action of *debt againſt an adminiſtrator for a debt due from the inteſtate to the plaintiff's teſtator.* The defendant *pleaded, that the plaintiff releaſed to him all the right and title to the eſtate of the teſtator*, and *this was before probate of the will*; and upon demurrer to this plea it was objected, that this releaſe did not bar the plaintiff of this action, becauſe the executor had only a poſſibility to be intitled to the teſtator's eſtate, and no intereſt till probate. It is true, ſuch a releaſe of all actions before probate had been good, becauſe an executor hath right of action before probate; but for the defendant it was inſiſted, that this releaſe was a good plea in bar; for if executor releaſe all his right and title to the teſtator's eſtate, and then ſues the releſſee (as the adminiſtrator is ſued in this caſe) for a debt due to the teſtator, the releaſe is good; becauſe if he had recovered, in this caſe judgment muſt be de bonis teſtatoris, which is the ſubject matter, and that being releaſed, no action can lie againſt the adminiſtrator; adjornatur. 2 Mod. 108. Paſch. 28 Car. 2. B. R. Morris v. Philpot.

16. Reſolved, that if an executor *conſents to a legacy, and dies before probate*, yet the aſſent is good enough. Ruled upon a demurrer. 2 Freem. Rep. 23. pl. 22. b. Trin. 1677. Anon.

17. Executor *arreſts* a man, and then proves the will; it is a bar between the parties, but not againſt ſtrangers. 3 Lev. 57. Trin. 34 Car. 2. C. B. Duncomb v. Walter. Such arreſt was held not tortious, and that it was good within the ſtatute to make the defendant a bankrupt. Skin. 22. 87. S. C.——Vent. 370. S. C. and judgment in C. B. affirmed in error in B. R. principally on the point of relation; for the Court ſaid it would be a great miſchief if it ſhould relate to the firſt arreſt as to the payment of money to ſtrangers.

18. Executor may make an *avowry for rent* before probate. 2 Show. 254, 255. Hill. 34 & 35 Car. 2. B. R. per Cur. in caſe of Duncomb v. Walter.

19. In caſe of an executor, if he has the probate *at the time when he declares*, it is well; but it is otherwiſe in the caſe of an adminiſtration; but becauſe in the principal caſe it appears by the declaration that the letters of adminiſtration were granted after the ſuit commenced,

commenced, it is ill; per Holt Ch. J. Comb. 371. Trin. 8 W. 3. B. R. Martin v. Fuller.

* 20. The *deviſe of a perſonal eſtate is not looked upon to be of any effect until probate* is made of the will by the executor; *neither can an executor or other perſon give a will in evidence concerning a perſonal chattel, without producing the probate*, for this will is no will until it has received a ſanction, or an allowance of it in the ſpiritual court, for they are to judge whether it be a will or not, and *the temporal courts are not to look upon it as a will till probate be made*; and in trover for goods, which a teſtator gave to his ſiſter in his life-time, brought againſt his executor for them, who would have given in evidence a former will, to have ſhewn that he had no power to give theſe goods; this was refuſed, becauſe he ought to have produced the probate; per Ward Ch. B. Devon ſummer aſſiſes 1708. Chaunter v. Chaunter.

## (A. a. 2) Suits againſt them before Probate.

1. EXecutor may be ſued for debts of teſtator before probate, *unleſs he refuſed the executorſhip* in due manner, ſo as adminiſtration may be granted, and ſo ſomebody ſuable for teſtator's debts. Went. Off. Ex. 36.

2. Bill for a *diſcovery of the perſonal eſtate* was brought before the will was proved, the ſame being controverted in the ſpiritual court; the ſame was pleaded to the bill, but over-ruled, a diſcovery being for the benefit of all perſons intereſted, and neceſſary for the preſervation thereof, and ſuch diſcoveries have been often ordered pendente lite in the ſpiritual court. 2 Vern. 49. pl. 47. Paſch. 1688. Dulwich College v. Johnſon.

## (B. a) What Acts will be an Adminiſtration to make a Conſent to the Executorſhip.

### Act in Law.

Br. Adminiſtrator, pl. 25. cites 8 H. 6. 35. S. C.

[1. IF an executor *brings any action* for the debt of teſtator, this ſhall be an adminiſtration. 8 H. 6. 36.]

Br. Adminiſtrator, pl. 35. cites

[2. If executor *takes teſtator's goods, and converts them* to his own uſe, this is an adminiſtration. 20 E. 4. 17.]

S. C. —— D. 166. b. pl. 10. Hill. 1 Eliz. S. P. accordingly by three juſtices, in caſe of Stokes v. Porter —— And. 11. pl. 23. S. C. held accordingly. —— Mo. 14. pl. 53. S. C. held accordingly. —— Bendl. 72. pl. 116. S. C. accordingly and the pleadings. —— Went. Off. Ex. 40. S. P. mentioned as held; and further, that if he does but take them into his own hands, ſome ſay it is the ſame without converting them.

Br. Adminiſtrator, pl. 35. cites

[3. But if executor *takes the goods which teſtator took from him by wrong* in his life, it is no adminiſtration. 20 E. 4. 17.]

S. C. & S. P. for he had proper right to them; quod non negatur.

[4. If

[4. If the executor *happens upon any thing which was teſtator's*, this is an adminiſtration. 24 E. 4. 5.] The very taking teſtator's goods into his hands without converting them is by ſome held to be an adminiſtration. Went. Off. Ex. 40. ——Br. Adminiſtrator, pl. 36. S. P. cites 21 E. 4. 5. [and ſo it ſeems it ſhould be here, this point being in the Year-book of (21) and there being no ſuch year of E. 4. as (24)]. ——Fitzh. Executor, pl. 38. cites 21 E. 4. 3. and 5.

[5. * But 41 E. 3. 31. the *claiming of goods to his proper uſe, without diſtribution* for the ſoul of the teſtator, is not adminiſtration as executor.] * Fitzh. Executor, pl. 65. cites S. C. —— The executor's taking goods which teſtator gave the executor in his life-time is not an adminiſtration to charge the executor, for they were the executor's own proper goods by the gift. Br. Executor, pl. 162. cites 11 H. 6. 35. per Cand.

[6. If *executors grant any of the chattels* of the teſtator's, this is an adminiſtration in law. D. 3 & 4 Ma. 135. 13.]

[7. If an executor *releaſes to a debtor* of the teſtator, this is an adminiſtration in law. 11 H. 4. 84.] It is an adminiſtration in law and in fact. Br. Adminiſtrator, pl. 20. cites 11 H. 4. 83, 84. ——S. P. Br. Executor, pl. 57. cites S. C. ——Br. Debt, pl. 65. cites S. C. ——2 Brownl. 58. Hill. 8 Jac. C. B. Wickenden v. Thomas, S. P.

[8. So if he *makes acquittance of any debt* of the teſtator. 8 H. 6. 36.] Br. Adminiſtrator, pl. 25. cites 8 H. 6. 35. ——Mo. 14. pl. 53. Mich. 5 & 6 P. & M. in caſe of Stokes v. Porter, S. P. held per Cur.

[9. If certain *goods* are *deviſed to one executor, and he takes them without the aſſent of the other co-executor*, this is an adminiſtration; becauſe a deviſee cannot take goods deviſed without aſſent of the executor. 11 H. 4. 84.] S. P. Br. Adminiſtrator, pl. 20. cites 11 H. 4. 83, 84. —— Br. Executor, pl. 57. cites S. C. but S. P. does not appear.

[10. But otherwiſe it is if he *takes them by delivery of the other executor*. 11 H. 4. 84.] Br. Executor, pl. 57. cites S. C. but S. P. does not appear.

[11. If executor *ſeiſes the goods* of the teſtator, this ſhall be an adminiſtration. 8 H. 6. 36.] Br. Adminiſtrator, pl. 25. cites 8 H. 6. 35. ——S. P. Br. Executor, pl. 57. cites 11 H. 4. 83. ——Went. Off. Executors, 40. S. P.

[12. If the executor *ſeiſes the goods of another man, to the intent to adminiſter them*, this ſhall be an adminiſtration, though the goods after are taken from him by the owner. Dubitatur. 8 H. 6. 35. b.] Br. Adminiſtrator, pl. 25. cites S. C.

[13. As if the *teſtator was tenant at will of certain goods*, and after his death his *executor ſeiſes them, ſuppoſing them to be the teſtator's*, with intent to adminiſter them, and after the owner of the goods takes them out of his poſſeſſion, yet this ſhall be an adminiſtration in law (for his *intent appears*). Dubitatur. 8 H. 6. 35. b.] Br. Adminiſtrator, pl. 25. cites S. C.

[14. If an executor being commiſſary, *ſequeſter the goods* of the teſtator, and does this *as commiſſary*, this is not any aſſent to the executorſhip. 20 H. 6. 1. b.] Fitzh. Executor, pl. 15. cites S. C.

Fol. 918.

[15. If a man makes *two executors*, and dies, and *one releaſes* an action to a debtor of the teſtator *before probate*, this is a conſent to the executorſhip, ſo that he *cannot after refuſe* to adminiſter. H. 8 J. B. R. WILKINSON v. THOMAS.]

The caſe is of two being made executors, and one

[16. If executor *proves the will*, it ſeems this is an adminiſtration in law, ſo that he cannot plead [he] unque executor. Dubitatur. 26 H. 8. 7. b.]

proved the will as in the next plea; and it was held by Shelley that he cannot plead ne unques executors ne unques adminiſtered as executor. But Fitzherbert contra, that he might plead ſo if he had not adminiſtered; for the probate does not make him executor unleſs he adminiſtered in this caſe, quod nota Curia conceſſit, to which Shelly ſaid, that he paid the fees of teſtator's goods, which is an adminiſtration. But Fitzherbert anſwered, that perhaps he did not pay them with the goods of the deceaſed. Quære this caſe. [See the Year-book, which in the old editions is 26 H. 8. 7. b. but in the laſt edition is 26 H. 8. 7. b. 8.]—Br. Executor, pl. 5. cites S. C. and obſerves that Fitzherbert's anſwer amounts to an admiſſion that payment of the fees out of the goods of the executor is an adminiſtration.

Br. Executor, pl. 5. cites 26 H. 8. 7. 8. [which is agreeable to the laſt edition ſince

[17. If A. makes *two executors*, and dies, and *one proves the teſtament in the name of both, againſt the will of the other*, this is not any adminiſtration for him who did not conſent to the probate, but he may plead ne unque executor, &c. For the probate does not make him executor if he does not adminiſter. 26 H. 8. 7. b.]

Ld. Brooke's time, but the old editions are, 26 H. 8. 7. b. as in Roll.]

Wentw. Off. Ex. 40. S. P.

18. If *A. being ſued as executor*, takes it upon him, and *pleads as executor in bar*, this is an adminiſtration in law, though he never adminiſtered before Br. Executor, pl. 88. cites 9 E. 3. 12. 14.

19. *Debt againſt executor*, who was *feme of the teſtator*, who *ſaid that ſhe remained in the houſe of her baron after his death, and there eat and drank of the goods of the deceaſed, till ſhe was a widow*. But Newton ſaid, cave; for this is an adminiſtration of thoſe things which are conſumed, and the ſtatute of *Magna Charta*, *cap.* 7. *is quod habeat rationabile eſtoverium ſuum interim de communi*. Br. Adminiſtrator, pl. 26. cites 19 H. 6. 14, 15.

20. *And* per Fulthorp, the feme *cannot kill an ox after the death of her baron*, and live upon it. Ibid.

21. *Alſo*, you *have not ſhewn that the baron was ſeiſed of any land of which ſhe ought to be endowed, ſo that ſhe ought to have any quarentine*, per Newton; by which Forteſcue *ſaid, that ſhe was there, and made funeral expences, and lived with us in common in the mean time, and occupied the pots, pans, and beds, abſque hoc, that ſhe adminiſtered in other manner before the adminiſtration to her committed*. Per Port. this is no adminiſtration; per Newton, yes; for this is a ſpecial adminiſtration; as in maintenance the defendant ſaid that the party for whom, &c. was his brother, and he ſhewed evidence to the inqueſt, abſque hoc, that he maintained in other manner; for this is a ſpecial maintenance; ſo here. Ibid.

22. In debt; per Paſton J. if J. S. dies, and a *ſtranger de ſon tort demeſne takes the horſe* of the ſaid J. S. *and ties him in the houſe by the head*, this is not any adminiſtration as executor. Br. Adminiſtrator, pl. 28. cites 21 H. 6. 27, 28.

23. *But* if he *diſpoſes of his beaſts or goods for his ſoul*, this is an adminiſtration as executor. Ibid.

24. *And*

24. *And ſpending of the goods about a funeral* of the teſtator is no adminiſtration as executor, for every ſtranger may do it. Ibid. Br. Adminiſtrator, pl. 6. S. P. cites 33 H. 6. 31.

25. *But* yet *in thoſe caſes he ſhall plead the ſpecial matter, abſque hoc, that he adminiſtered as executor*, for this is in a manner adminiſtration, but not as executor. Ibid. [ 208 ]

26. A man made S. his *executor*, who *refuſed*, and the *ordinary committed the adminiſtration to W. P.* and *S. as ſervant to W. P. ſells the goods, and accounts to W. P.* this is no adminiſtration which ſhall charge him as executor, and he *may plead this matter, abſque hoc, that he adminiſtered in other manner*. Br. Adminiſtrator, pl. 41. cites 31 H. 6. 13.

27. Debt *againſt executor*, who *ſaid that the teſtator died inteſtate, and the ordinary committed the adminiſtration to J. N. who ſold ſuch goods to him, by which he adminiſtered them ut propria bona, abſque hoc, that he adminiſtered other goods;* and by ſome this amounts to general iſſue; by which he *ſaid that he delivered certain goods and his apparel*, and ſhewed what, &c. abſque hoc, that he was executor, or adminiſtered as executor, &c. Br. Executor, pl. 165. cites 32 H. 6. 6, 7.

28. And there it is ſaid, that if a man *uſe the goods of the teſtator, ut bona propria*, this is not adminiſtration to charge him; and *contra if he uſe them ut bona teſtatoris;* quod nota diverſity; for it is ſaid there, that if a man claims J. N. as his ward, who is not his ward, he ſhall be charged in action of waſte, and e contra if he enters as a treſpaſſor. Ibid.

29. Note per Cur. that if three are made executors, and *they deliver to the feme of the teſtator her robes and apparel*, this is no adminiſtration as executors to charge them; for the feme ſhall have her convenient apparel, and not the executors. Br. Adminiſtrator, pl. 6. cites 33 H. 6. 31.

30. The *committing of the adminiſtration does not bind*, if he does not adminiſter. Br. Adminiſtrator, pl. 31. cites 37 H. 6. 27, 28.

31. If the *wife takes her apparel neceſſary* for her body, though this is an adminiſtration, yet it is not ſuch as will charge her. Br. Adminiſtrator, pl. 31. cites 37 H. 6. 27, 28. by admiſſion.

32. *Debt againſt an executor who never adminiſtered;* it was touched, that if he *pleads in bar*, this *is an adminiſtration in law;* quod nota ibidem in fine caſus. Br. Adminiſtrator, pl. 29. cites 9 E. 4. 13.

33. *Debt againſt executor* in L. who *pleaded a gift of the teſtator of certain goods at B. in another county, by which he took them, abſque hoc that he adminiſtered in other manner;* & non allocatur; for the matter of the plea does not prove any adminiſtration. Br. Adminiſtrator, pl. 30. cites 9 E. 4. 40. Br. Barre, pl. 42. cites S. C.

34. *And* per Lakon, if a *feme ſeiſes the goods of her baron to the uſe of the executors* of her baron, this is no adminiſtration to bind the feme. Ibid.

35. *Debt againſt the biſhop of C. as executor;* he *ſaid that he refuſed before J. S. his commiſſary at W. and becauſe he is metropolitan, and the teſtator had goods in divers counties, therefore he ſequeſtered the goods as ordinary, and not as executor;* judgment of the writ; and a good plea per Cur. *without traverſing the adminiſtration as executor,* for this plea is to the writ and not in bar, and alſo is *matter in law,* whether this adminiſtration be as executor or as ordinary, which the lay gents cannot try. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.

36. By which the plaintiff *ſaid, that before the refuſal* the biſhop *ſold certain land of the teſtator's for* 300 *l. according to the will of the teſtator,* &c. and therefore he cannot refuſe after agreement, and this matter cannot be done as ordinary, for he as ordinary cannot ſell the land; contra as executor, and executor may adminiſter without proving the teſtament, but he cannot bring action before the teſtament proved; and if it appears upon the back quod probatum eſt, &c. where it is not proved in fact, this ſhall not be traverſable, but the iſſue ſhall be if he was executor or not, and not if he proved it or not; quod non negatur. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.

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37. It was argued, that if the *executors have expended their own proper money in the buſineſs of the teſtator,* this ſhall be ſaid an adminiſtration. Br. Adminiſtrator, pl. 37. cites 21 E. 4. 21.

38. If executor *buries the teſtator,* this is not adminiſtration. Per Frowike Ch. J. Kelw. 63. a. Trin. 20 H. 7.

Went. Off. Ex. 49.

39. If a man *pays teſtator's debts with his own goods,* and meddles not with teſtator's goods, it is not an adminiſtration. Per Frowike Ch. J. Kelw. 63. a. Trin. 20 H. 7.

40. If there be *two executors,* and *one of them only proves the will,* and *the other by his delivery, and as his ſervant takes and ſells the goods,* this is no adminiſtration by him who acted as ſervant. Cro. E. 858. Mich. 4 Eliz. Godfrey v. Woodard.

Kelw. 63. Contra per Frowike Ch. J.

41. The very *keeping of goods* by an executor ſhall be accounted as an adminiſtration. Per Fenner J. Goldſb. 152. pl. 79. Hill. 43 Eliz. Eaſt v. Newman.

42. A *leſſee for years* of lands, by his laſt will, *deviſed his term to A. whom he makes his executor,* and dieth; *A. entered before any probate* of the will, *and held the ſame for a year,* and died; per Cur. the property of the term was lawfully veſted in the executor by his entry, and the deviſe well executed without any probate. Dy. 367. a. pl. 39. Mich. 22 Eliz. Anon.

43. *Debt upon an obligation* of 100*l. one of the defendants was outlawed,* the *other pleaded that he, who was outlawed, was made executor, and ſolely proved the will, and adminiſtered, and that the defendant, as ſervant unto him, took divers of the teſtator's goods by his delivery, and by his appointment had ſold them, abſque hoc that he adminiſtered as executor, or in any other manner.* And it was thereupon demurred, and adjudged to be an ill plea; becauſe he does *not ſay, that he refuſed before the ordinary, nor confeſſed any adminiſtration;* for that which he confeſſes is not any adminiſtration, and

and ſo no anſwer to the plaintiff. Wherefore it was adjudged for the plaintiff. Cro. E. 858. pl. 27. Mich. 44 & 45 Eliz. C. B. Godfrey v. Woodward.

44. If executor *commands J. S. to take goods of teſtator out of the hands of W. R.* this is an adminiſtration. See Went. Off. Ex. 39, 40. and cites it as clearly admitted per Ld. Dyer, in caſe of Greyſbrook v. Fox.

45. If the *wife takes more apparel of her own than is neceſſary*, this is an adminiſtration as the book admits; but if by the *aſſent of executor*, or by his delivery, it is not. Went. Off. Executors, 40.

46. *Delivering money of teſtator's for fees about proving the will*, is an adminiſtration as executor. But otherwiſe if he lay out his own money only. See Went. Off. Ex. 40.

47. In ſome caſes a man may meddle with the goods of the teſtator, and yet ſhall not be an executor by it. 1ſt, As *to pay funeral charges*, 21 E. 4. 5. 21 H. 6. 20. Dy. 256. a. 20 H. 7. 5. 2dly, To meddle with the goods by virtue of *letters ad colligend'* from the ordinary, 10 H. 7. 15. 28. 3dly, When a man is *made executor by a will, which is after revoked, and meddles by virtue of that will*, Dy. 166, 167. 4thly, Per Serj. Hard. *taking them as ſervant to another*, 38 E. 3. 20. 3 Cro. 858. 5thly, Meddling with goods *as ſupervifor or coadjutor*, Dy. 166. Swinb. 6. Pt. 93, 94. But here Jones ſaid, when he takes the goods generally, being named executor, it ſhall be intended that he takes them as executor, 8 H. 6. 36. 20 H. 6. 1. b. 11 H. 4. 83. 21 E. 4. 5. 3 Cro. 810. And *when a man has once made himſelf executor of his own wrong, by meddling with goods, though adminiſtration be afterwards granted to himſelf*, or to another, *it ſhall never be in his power to purge the wrong*. 3 Cro. 102. 565. 5 Co. 33. Freem. Rep. 151, 152. pl. 172. Paſch. 1675. Parſons v. Mayeſden. [ 210 ]

48. An executor, before probate, *poſſeſſed himſelf of the teſtator's goods, which were appraiſed and put into an inventory*; then he *paid a debt*, and *converted ſome to his own uſe*, and *afterwards refuſed to prove the will*. The Court held, that the granting adminiſtration in this caſe was a mere void act, and that the executor ſhall be charged for the whole perſonal eſtate; and judgment for the plaintiff. Mod. 213. pl. 47. Paſch. 28 Car. 2. C. B. Parten v. Baſeden.

## (C. a) What Act or Thing will make a Man Executor de ſon Tort.

[1. D. 8 & 9 Eliz. 255. 8. per Cur. where the defendant has a *writ ad colligendum* granted by the commiſſary, in which was *authority given ad vendendum* & venditioni exponendum *bona inteſtati peritura* & quæ ſine detrimento ſervari non poſſunt et ad compotum inde reddendum, *by force of which he ſold* a grain called

Kellw. 81. 82. pl. 2. Hill. 21 H. 7. Capel's caſe like point, and held accordingly. —

called *blend coitt*, that this was ſuch adminiſtration by which the defendant ſhould be charged of his own wrong; for the ordinary himſelf could not do it.]

For the power of ſuch, and alſo of ſo-veſſeers is only to preſerve and keep the goods, and by ſelling or diſpoſing, though of bona peritura, they become executors de ſon tort, notwithſtanding that ſuch collector was expreſsly warranted by the ordinary's letters to make ſale. For that the ordinary himſelf could not ſo do. Went. Off. Ex. 173, 174.

[2. If a *feme takes more of her apparel*, after death of the baron, *than is convenient*, ſhe ſhall be executrix of her own wrong. * 33 H. 6. 31. b. D. 1 Eliz. 166. 11.]

* Br. Executors, pl. cites S. C. ——Fitzh. Executors, pl. 24. cites S. C.

[3. But ſhe may take her *apparel*, which is *convenient*, well enough. 33 H. 6. 31. b. per two. But there quære. D. 1 El. 166. 11.]

† Br. Executors, pl. 19. S. P. and refers to S. C.—Fitzh. Executors, pl. 24. cites S. C. & S. P. by Priſot, Moyle, Danby, and Aſcough.

[4. A man may adminiſter divers goods of the teſtator for *expences of the funeral*. For it is matter of charity. ‡ 33 H. 6. 31. b. D. 1 El. 166. 11. § 21 E. 4. 5.]

‡ Fitzh. Executor, pl. 24. cites S. C. § Br. Adminiſtrator, pl. 36. cites S. C. per Choke, that it is not.——Fitzh. Executor, pl. 38. cites S. C. ——But in ſuch caſe heed muſt be taken touching the meaſure and proportion, and either mere neceſſity, as church duties, &c. or at leaſt decent ſuitableneſs to his quality, muſt be the bounds, or he thinks this laſt muſt be either utterly excluded or held within very narrow bounds and compaſs. Went. Off. Ex. 173.

[5. If a ſtranger *ſeizes goods* of a dead perſon, without doing any other act, whether this ſeizure makes him executor de ſon tort? Quære. D. 1 & 2 Ma. 105. 17. [It is] not. ‖ 21 E. 4. 5.]

‖ Br. Adminiſtrator, pl. 36. cites S. C. per Choke.—Fitzh. Executor, pl. 36. cites S. C. by Choke.

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[6. *Feme executrix* adminiſters, and after takes baron, and after they are *divorced cauſa præcontractus*, and feme appeals from the ſentence, and *pending* this *appeal*, *baron adminiſters* the goods. *Feme dies*, *the appeal not diſcuſſed*, and the adminiſtration of the goods of the teſtator is granted to another; whether the baron may be charged as executor de ſon tort for the ſaid adminiſtration. D. 1 & 2 Ma. 105. 17. Dubitatur.]

[7. A man ſhall not be charged as executor de ſon tort, unleſs he *does a thing as executor*, as paying debts, or demanding the *debts* of the teſtator, or other ſuch things. 21 E. 4. 5.]

Br. Adminiſtrator, pl. 36. cites S. C. per Choke.—Fitzh. Executor, pl. 38. cites S. C. per Choke.——It is not every intermeddling that makes one executor de ſon tort, as if one do but take a horſe of the deceaſed's, and ties him in his houſe or ſtable, this makes him not executor of his own wrong. Went. Off. Ex. 174.

So if one delivers to the wife apparel convenient only to her degree; but delivering more is otherwiſe. Ibid.

[8. If no one takes upon him to be executor, nor takes letters of adminiſtration, the *uſing of the goods* by any makes him executor de ſon tort. Reſolved. 5 Rep. 33. b. READ'S CASE.]

S. C. cited 2 Le. 224. in pl. 284.



[9. The

[9. The ſame law is, if in the caſe aforeſaid, he *takes the goods into his poſſeſſion*, which is the office of an executor or adminiſtrator. Reſolved. 5 Rep. 33. b. READ'S CASE.]

[10. But in 41 E. 3. 31. per Thorpe, if a man *claims goods to his proper uſe*, and does not diſtribute for the ſoul of the teſtator, this is not adminiſtration to charge him as executor, and it ſeems this is intended executor de ſon tort.]

Fitzh. Executor, pl. 65. cites S. C. —— S. C. cited 2 Le. 224. in pl. 284. —— S. C. cited by Manwood. Dal. 31. pl. 16. 15 Eliz.

11. *Debt lies againſt one executor only which hath the poſſeſſion of the goods.* Dy. 166. b. pl. 11. Hill. 1 Eliz. in Porter's caſe, cites Regiſtrum, fol. 141. and 35 H. 6.

12. Debt againſt P. as executor of his own wrong, and becauſe he *received a debt, and made an acquittance*, it lies well, per the juſtices; ſo if he takes goods into his poſſeſſion. Dy. 166. b. pl. 10. Hill. 1 Eliz. in Porter's caſe, cites Long quinto E. 4. 72.

13. Where a man has colour, as a coadjutor, *ſupervifor*, &c. to meddle, he may plead the ſpecial matter, abſque hoc, that he adminiſtered in other manner. D. 166. b. 167. a. pl. 11. Hill. 1 Eliz.

So where a man is made executor by a will, which will is afterwards diſproved by probate of a later will. D. 166. b. pl. 11. Hill. 1 Eliz.

15. Debt againſt an executor; the caſe was, *A. made E. his executrix*, and died poſſeſſed of divers goods. *E. made a fraudulent gift of the goods to J. S. and continued poſſeſſed, and took the defendant to huſband, and died.* The *defendant, poſſeſſed of the goods, paid legacies.* It was the opinion of the juſtices, præter Fenner, that they were aſſets in his hands, and (the gift being fraudulent) were liable to the plaintiff's execution. Cro. E. 405. pl. 16. Trin. 36 Eliz. B. R. Wilcox v. Watſon.

Mo. 396. pl. 518. Watſon's caſe, S. C. the defendant pleaded plene adminiſtravit, and the Court adjudged for the plaintiff; for the defendant has confeſſed himſelf executor by the plea of plene adminiſtravit, and therefore he is chargeable; for the property of the goods did not paſs out of the feme by the grant being made by fraud as aforeſaid by the ſtatute 13 Eliz.

16. And Popham ſaid, *if the gift were good againſt all but creditors, (as it is,) then they belong to the donee, and in his hands are liable to this debt; and if the gift be void, they remain to the executors of the feme, and then the baron, having taken them and paid legacies, is chargeable by reaſon thereof as executor de ſon tort;* and ſo thoſe goods, quacunque via data, are liable to this debt, into whoſoever hands they come, unleſs by title paramount, or by ſale bona fide; wherefore it was adjudged for the plaintiff. Cro. E. 406. pl. 16. ut ſupra, Wilcocks v. Watſon. [212]

17. Debt againſt an executor, he pleaded ne unques executor, &c. and an eſpecial verdict found, that *adminiſtration* of the goods of the teſtator *was committed to the wife of the defendant, who is dead, and that he kept bonam partem bonorum in his hands, and ſold them.* Williams moved that this verdict was void for the uncertainty, for bonam partem is altogether uncertain; but it was held to be well enough; for if he detain any part, it makes him executor de ſon tort,

tort, &c. Wherefore it was adjudged for the plaintiff. Cro. E. 472. pl. 27. Hill. 38 Eliz. in B. R. Anon.

18. 43 *Eliz. cap.* 8. *ſ.* 2. *Strangers* meddling *with inteſtate's goods*, or getting a releaſe *of any debt* without a valuable conſideration, *unleſs for ſome debt due from inteſtate, ſhall* be chargeable as *executor of his own wrong*, ſo far only *as ſuch goods or debts releaſed will ſatisfy, deducting all juſt principal debts owing to him, on good conſideration by inteſtate, and all other payments made by him, which lawful executors or adminiſtrators ought to have paid.*

19. Where the wife *milks the cows* of the baron, ſhe was adjudged to be executor in her own wrong. D. 166. b. Marg. pl. 11. cites Mich. 2 Jac. Gerret v. Carpenter.

20. If an *executor* be made, who *proves the will, or takes upon him the executorſhip*, yet if a *ſtranger after takes any of the goods and uſes them, or diſpoſes of them as his own*, this does not make him executor of his own wrong, becauſe there is a rightful executor who may be charged, and the goods taken out of his poſſeſſion, after he has adminiſtered, are aſſets in his hands. Reſolved. 5 Rep. 33. b. 34. a. Trin. 2 Jac. C. B. Read's caſe.

14. *But* though there be an executor who adminiſters, yet *if a ſtranger after takes the goods, claiming to be executor, and pays debts, receives rents, or pays legacies, and intermeddles as executor*, there, for his expreſs adminiſtration as executor, he may be charged as executor of his own wrong, though there be a rightful executor. 5 Rep. 34. b. Read's caſe.

But when he meddles without any colour of title or authority in receiving debts and diſpoſing goods to his own uſe, it is. Ibid. 184. Arg. —— But aſſiſting an infant executor in ſelling the goods does not make one executor de ſon tort. Cro. E. 354. pl. 25. Trin. 33 & 34 Eliz. B. R. Clerk v. Hopkins.

21. *Burying* or *taking goods into cuſtody*, to preſerve them, *is not any adminiſtration*. Per Warburton J. 2 Brownl. 187. 10 Jac. C. B. in caſe of Lawry v. Aldred and Edmunds.

22. Executor de ſon tort *is* ſuch as takes upon him the office of an executor by intruſion, not being conſtituted by the teſtator or deceaſed, nor for want of ſuch conſtitution ſubſtituted by the ordinary to adminiſter. Went. Off. Ex. 171.

23. *Taking a dog* will make executor of his tort. D. 166. b. 11. Marg. cites Trin. 1652. C. B. Barker's caſe.

So if the huſband after the death of the wife detains any of the goods which the wife had as adminiſtratrix, it makes him executor de ſon tort. Cro. E. 472. Anon.

24. Leſſee for years rendering rent dies inteſtate, his wife takes out letters of adminiſtration, and marries a ſecond huſband, and dies, and *the huſband continues in poſſeſſion of the term*, and receives the profits; it was agreed, that for the profits received he was anſwerable as executor de ſon tort, and 10 H. 7. was cited as an authority. 2 Mod. 175. Arg. in caſe of Loyd v. Langford, cites it as adjudged. Trin. 22 Car. 2. in caſe of Stevens v. Carr.

[ 213 ] 25. The *bare poſſeſſion of goods* ſhall not make a man executor of his own wrong, unleſs he does undertake to do ſome acts which none but an executor can lawfully do, as to releaſe the debt of the teſtator,

teſtator, &c. Freem. Rep. 13. pl. 12. Trin. 1671. C. B. Garter v. Dee.

26. An action of debt for rent was brought againſt the defendant as executor of A. The caſe upon a ſpecial verdict was, that A. *being ſeiſed in fee of certain lands, leaſed them to B. for* 99 *years, in conſideration of* 300*l.* and *B. re-demiſes the whole term to A. rendering* 20*l. per ann.* (the intent of the bargain *being to ſecure an annuity of* 20*l. to B. which he purchaſed with the* 300*l.*) then *A. dies, and the defendant, widow of A. entered upon thoſe re-demiſed lands as guardian to her ſon.* In this caſe *here can be no executor de ſon tort of the term, becauſe it is merged in the reverſion,* and is become one entire eſtate with that; and *ſo when the defendant entered as guardian* to her ſon, ſhe could not be an executor de ſon tort, becauſe the term was not in being. Freem. Rep. 218. pl. 226. Mich. 1676. Floyd v. Langfield.

2 Mod. 175. Loyd v. Langford, S. C. held accordingly, and the Court told the plaintiff, that he having no remedy at law, he might ſeek for relief in Chancery if he thought fit.

27. *Debt againſt an executor for rent,* incurred in his own time; upon a ſpecial verdict they find the leaſe and the deſcent of the reverſion to the plaintiff, and that the *defendant, after the death of the leſſee, did feed his cattle with the hay that grew upon the land.* Adminiſtration was granted to the defendant, with an exception of this term. The queſtion was, whether the defendant here could wave the term after he had entered? Adminiſtration was taken after the rent grew due. The Ch. J. ſaid, that *if a man die inteſtate, and another is executor de ſon tort, he ſhall be charged for the rent till he is evicted by the adminiſtrator;* Windham and Atkins of the ſame opinion, that here he hath entered as executor, keeping the cattle five weeks upon the farm; and here is no gift to purge this wrong. Freem. Rep. 261. pl. 282. Trin. 1679. Garth v. Taylor.

28. If *adminiſtration* be firſt granted, and then *another takes the goods,* he is not thereby executor de ſon tort. Per Holt Ch. J. 7 Mod. 31. Trin. 1 Ann. B. R. Anon.

If he gets goods into his hands before, though adminiſtration be afterwards granted, yet he remains chargeable as a wrongful executor, unleſs he delivers the goods over to the adminiſtration before the action brought, and then he may plead plene adminiſtravit. Per Holt Ch. J. 1 Salk. 313. Anon. ——— In ſuch caſe the taker is treſpaſſor only to the executor or adminiſtrator. Went. Off. Ex. 174. cites 5 Rep. Read v. Carter. ———It is no plea to ſay that he delivered the goods to the perſon to whom adminiſtration was granted. Per Cur. Cro. E. 565. pl. 27. Patch. 39 Eliz. C. B. Bradbury v. Reyneil. ——— S. C. cited 5 Mod. 137.

29. Per Holt Ch. J. if H. *gets goods of an inteſtate into his hands, after adminiſtration is actually granted,* it does not make him executor of his own wrong; *but if he gets the goods into his hands before,* though adminiſtration be granted afterwards, yet he remains chargeable as a wrongful executor, *unleſs he delivers the goods over to the adminiſtrator before the action brought,* and then he may plead plene adminiſtravit. 1 Salk. 313. pl. 19. Trin. 1 Ann. B. R. Anon.

S. P. by Holt Ch. J. 7 Mod. 31. Trin. 1 Ann. B. R. Anon.

## (C. a. 2) De ſon Tort. Of what he may be.

2 Mod. 175. Arg. cites S. C. reſolved that an executor de ſon tort cannot be of a term in futuro, and that the laſt aſſignee had the beſt title.

1. *A Leaſe in reverſion for years was granted to J. S. who died inteſtate, his wife aſſigned it to B. and afterwards took letters of adminiſtration, and made an aſſignment of it to the plaintiff.* Reſolved that the laſt aſſignee ſhould have it; for in this caſe no entry can be made, nor can any man be executor de ſon tort of a term in reverſion. Mo. 126. pl. 273. Paſch. 25 Eliz. Kenrick v. Burges.

——S. C. cited 3 Mod. 91. Hill. 1 Jac. 2. B. R. and held accordingly, and a judgment in C. B. affirmed. Mayor (of Norwich) v. Johnſon. ——2 Show. 457. S. C. cited and held accordingly. ——3 Lev. 35. S. C. ——Comb. 8. S. C. ——Clayt. 116. Vernat's caſe. ——In caſe of a leaſe of three lives made to A. for the life of A. and B. and C. his ſons, and the longeſt liver, if one dies and another enters he is executor de ſon tort. Arg. 3 Mod. 320. in caſe of Bradburn v. Kennedale. ——Carth. 164. 166. S. C. & S. P. by Holt Ch. J. becauſe the ſtatute made it aſſets. ——According to the modern opinions, executors de ſon tort may be of a term. 2 Mod. 74. Arg. cites Trin. 1653. * Porter v. Sweetman.

* S. C. cited accordingly, and he ſhall be liable to the payment of the rent. Freem. Rep. 218.

## (D. a) The Power of an Executor de ſon Tort, or of one who is not lawful Executor.

† Fol. 919.

[1. IF the *ordinary grants adminiſtration* to another of the goods of J. S. and *after he himſelf adminiſters ſome of the goods* of the teſtator, he may be charged † for this adminiſtration, though there be an adminiſtrator. 12 R. 2. Adminiſtrator, 21. (But the book is, that the action was brought againſt him as ordinary.)]

S. C. cited by Trevor Ch. J. and ſaid, that he never heard of this caſe having ever been denied. Comyns's Rep. 152. Mich. 5 Ann. C. B. pl. 102. Anon.

[2. If *A. makes a will, and J. S. executor* of it, *and after makes a later will, and* of this makes *J. D. executor*, and dies; and after *J. S. proves the firſt will* in the prerogative court, and there this is allowed, decreed and publiſhed for a will, and after J. S. *adminiſters the goods* of the teſtator by force of this *for half a year after*, and within this time B. who was bound by obligation of 100*l.* to the teſtator, paid the money to J. S. he not having knowledge of any later will, and upon this J. S. *gives a releaſe* to him, and after *the probate of the firſt will is repealed*, and the *will itſelf diſannulled*, and the later will proved; this *payment and releaſe is no bar* of the action upon the ſaid obligation brought by J. D. the laſt and true executor. Becauſe it doth not lie in the power of the ordinary to make another executor than he who is made executor by the teſtator himſelf, and though it be miſchievous to him who pays the money, and the executor who proved the will before he knew of the laſt will, yet the miſchief would be as great of the other part, if the ordinary ſhould have power to make another executor than he who is the true executor made by the teſtator, and he ſhould have power to diſpoſe of the eſtate of the teſtator. Mich. 16 Car. B. R. between GREVES AND WEIGHAM, adjudged upon a demurrer upon the advice of all the judges of Serjeant's

Serjeant's Inn. Intratur Hill. 15 Car. Rot. 1350. For the ordinary hath no power to grant adminiſtration, or to give to any other power to diſpoſe of the eſtate of the teſtator where he had made an executor. Com. 277. GRESBROOKE'S CASE.]

3. Executor de ſon tort *cannot bring an action*; for he cannot ſhew teſtament containing his name as he ought. Br. Adminiſtrator, pl. 8. cites 35 H. 6. 31.

4. He may pay *legacies and receive debts*, but he *cannot bring action*; Arg. Godb. 104. pl. 122. Mich. 28 & 29 Eliz. C. B. Anon.

5. Executor de ſon tort *cannot retain*. The defendant in this caſe pleaded, that the teſtator owed his wife dum ſola 800l. and that he made his will, but doth not ſhew that he was thereby made executor, and therefore, having no title, he became executor de ſon tort, for which cauſe his plea was held ill; and judgment was given for the plaintiff. 2 Mod. 51. Trin. 27 Car. 2. C. B. Prince v. Rowſon.

6. *Sale of Eaſt India ſtock by a wrongful adminiſtrator, the purchaſor having notice of the fraud, decreed to be transferred back to the rightful adminiſtrator*, and that the adminiſtratrix of the purchaſor ſhall account. Fin. Rep. 430. Mich. 31 Car. 2. Johnſon v. Eaſt India Company & al'.

7. If executor de ſon tort *of a term* commits *waſte on the land, and he in reverſion recovers the place waſted*, yet that is no prejudice to the *creditors*, becauſe it is a devaſtavit in the defendant; and if there happen to be a rightful executor or adminiſtrator, he ſhall recover againſt the executor de ſon tort, but he *cannot get the land again* from the reverſioner; beſides, his entering of his own wrong after leſſee's death makes him chargeable. 2 Show. 458. pl. 423. Hill. 1 & 2 Jac. 2. in caſe of Norwich (City) v. Johnſon.

8. An executor de ſon tort, who is but an executor de facto, if he does *lawful acts* with the goods, as paying of debts in their degrees, it ſhall alter the property againſt the lawful executor; as if he pay juſt and honeſt debts, the rightful executor ſhall not avoid that payment, and yet it is an act done by one that has no right. It is true, he is not quit againſt the rightful executor, but he ſhall maintain *trover* againſt him; but what ſhall he *recover in damage? only for ſo much as he has miſapplied*, and all that he has well applied ſhall be abated in damages. And what is the reaſon of this? Why, becauſe the meddling with the goods is that which gives the creditor notice who is executor, and bound to pay the debts; and the creditor is not bound to inquire into the executor's title; if there be a colour and appearance of it, it ſuffices; per Holt Ch. J. 12 Mod. 471, 472. Paſch. 13 W. 3. in caſe of Parker v. Kett.

9. *Payment to an executor having a probate, and afterwards repealed*, does not diſcharge the party againſt the legal executor. Comyns's Rep. 150. pl. 102. Mich. 5 Ann. C. B. Anon.

## (E. a) Executor de ſon Tort.

### [How to be charged or come at where there is an Adminiſtrator or Executor.]

*[216]

† Hob. 49. pl. 54. S.C. adjudged. —The third reſolution in Read's caſe, Trin. 2 Jac. C. B. that when another takes goods before the rightful executor has taken the executorſhip upon him, or proved the teſtament; the other may be charged as executor de ſon tort; for the rightful executor ſhall not be charged but with ſuch goods as come to his hands after that he has taken upon him the charge of the will. 5 Rep. 34. a.

‡ S. C. cited 2 Le. 224. in pl. 284.

[1. IF a man dies *inteſtate*, and a ſtranger adminiſters de ſon tort, and after *adminiſtration is granted to another*, yet a *creditor* of the inteſtate *may afterwards charge the ſtranger as executor* * *de ſon tort*, becauſe that it may be no aſſets came to the hands of the adminiſtrator to ſatisfy his debt, and he cannot charge the adminiſtrator for thoſe goods which never came to his hands, but only to the hands of the executor de ſon tort; and the creditor has no means but in Chancery to compel the adminiſtrator to bring his action of treſpaſs againſt the executor de ſon tort. P. 13 Ja. B. R. adjudged, † KEBLE AGAINST OSBESTON. ‡ 5 Rep. 34. READ'S CASE, reſolved where ſtranger adminiſtered de ſon tort before the true executor adminiſtered or proved the will.]

2. *Executor de ſon tort demeſne* ſhall not be impleaded as adminiſtrator, but as executor, in pain of abatement of the writ. Br. Adminiſtrator, pl. 15. cites 50 E. 3. 9.

3. He may be *ſued as executor*; Arg. 2 And. 39.

4. Debt againſt executor de ſon tort, who *pleaded that he never was executor, nor adminiſtered as executor*. It was held in this caſe not to be any whit material whether he has aſſets or not; but to prove he has adminiſtered any thing of never ſo little in value, it ſhall charge him for the whole debt. Clayt. 6. pl. 12. Aug. 7 Car. Townſley v. Ingham.

5. An executor de ſon tort ſhall not be *charged* for more than he converted, and ſhall *diſcharge* himſelf by delivering over the reſt to the rightful executor; admitted; Arg. Mod. 213. pl. 47. Paſch. 28 Car. 2. C. B. in caſe of Parten v. Baſeden.

## (E. a. 2.) Executor de ſon Tort.

### Where he takes ſubſequent Adminiſtration.

1. IN debt where a man adminiſters as executor de ſon tort demeſne, and after takes adminiſtration of the ordinary, this *ſhall have relation to the time of the inteſtate's death*; Br. Relation, pl. 12. cites 9 E. 4. 33. and ſays, which ſee in the end of the caſe there.

2. If

2. If executor of his own wrong *releaſes debt*, and after *purchaſes adminiſtration*, the releaſe is not good. Mo. 119. pl. 263. Paſch. 24 Eliz. C. B. Lecke v. Grevell.

3. If executor de ſon tort *ſells a term in poſſeſſion*, and afterwards *takes adminiſtration*, the ſale is good by relation; but otherwiſe it is of a term *in relation*; for if he ſells ſuch a term before adminiſtration to A. and after adminiſtration to B. the ſale to A. is void, and B. ſhall enjoy. Mo. 126. pl. 273. Paſch. 25 Eliz. in Scacc. Kenrick v. Burgeſs.

S. C. cited Arg. 2 Mod. 175. —— 3 Mod. 91, 92. Arg. cites S. C. —— 2 Show. 457. S. C. cited per Curiam.

4. He may be *ſued either as executor or adminiſtrator*, for it may be, that while he adminiſtered of his own tort he waſted the goods, then if he be only ſued as adminiſtrator he ſhall only be charged of the goods that came to his hands ſince adminiſtration. Cro. E. 102. pl. 9. Trin. 30 Eliz. B. R. Stubbs v. Rightwiſe.

S. P. ſo that if he will be relieved or ſatisfied out of the goods before diſpoſed of, he muſt be ſued as executor, and if ſuch adminiſtrator pleads in abatement that adminiſtration * was committed, and demands judgment if ſuit ſhall be againſt him as executor, the plaintiff muſt in the replication ſet forth the ſpecial matter as he thinks. Went. Off. Ex. 178.

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5. Executor of his own wrong *pleads plene adminiſtravit, and then takes letters of adminiſtration*, and then *puis darrein continuance pleads detainer to ſatisfy a debt of a higher nature due to himſelf.* Ellis J. ſaid, if he had took adminiſtration after the ſuit began, and before the plea pleaded, he might have pleaded a detainer; but not if he takes adminiſtration after he has pleaded. Freem. Rep. 265. pl. 288. Mich. 1679. Whitehead v. Sampſon.

6. In an action of debt againſt the defendant as executrix of her huſband for arrears of rent due from the teſtator, the defendant *pleaded* in abatement of the writ, *that after the death* of her huſband *adminiſtration* of his goods and chattels *was granted to her, and that ſhe ought to have been named adminiſtratrix* in the writ, *and not executrix* unde pet' judicium de brevi & quod breve iſtud caſſetur. The plaintiff *replied*, that after the death of the huſband, and *before the adminiſtration committed, the defendant adminiſtered divers goods* and chattels of her huſband's *at ſuch a day and place*, &c. To this the defendant demurred, and judgment was given for the plaintiff; for ſhe ſets not forth the day when *adminiſtration* was *committed*; ſo it *might be after the writ brought*; and beſides, if ſhe diſpoſed of the goods as executrix of her own wrong, the taking of adminiſtration afterwards, though before the writ was brought, will not hinder the plaintiff from charging her as executrix of her own wrong. 2 Vent. 179. Trin. 2 W. & M. in C. B. Pyne v. Woolland.

## (E. a. 3) Executor de ſon Tort.

### In what Caſes; and chargeable how far.

1. IN debt, if a man adminiſters de ſon tort demeſne, and action is brought againſt him, and *pending the writ the adminiſtration is committed to him*, yet the writ is good. Br. Executors, pl. 74. cites 21 H. 6. 8.

2. *But if* the adminiſtration was committed to him *before the writ purchaſed*, then he ought to bring the action againſt him as againſt the adminiſtrator, or otherwiſe it ſhall abate. Ibid.

3. By which he *pleaded by the form*; to which the *plaintiff ſaid, that at another time he brought ſuch a writ againſt him as executor, the which was abated by falſe Latin, wherefore he purchaſed this writ by Journey's accounts as againſt executor, and that the day of the firſt writ purchaſed the adminiſtration was not committed; priſt*; and awarded a good replication, and the iſſue joined accordingly. Ibid.

Br. Ordinary, pl. 13. cites S. C.

4. If a man be *executor de ſon tort demeſne*, and *action is brought againſt him*, and *he takes the adminiſtration of the ordinary pending the writ*, there the writ is good; contra if it had been taken before the writ purchaſed notwithſtanding his adminiſtration before as executor de ſon tort, &c. Per Cateſby, quod fuit conceſſum. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.

5. *Sci. fa.* againſt executor, who *ſaid that before the writ purchaſed the ordinary had committed adminiſtration to him, judgment of the writ which named him executor*; and by the beſt opinion it is

[ 218 ] no plea, becauſe he did *not allege committing of the adminiſtration to be before he adminiſtered as executor*; for if he firſt adminiſtered and after took the adminiſtration, this ſhall not change the action, becauſe he was executor lawfully by the teſtament; but if a man adminiſters de ſon tort demeſne, and after takes the adminiſtration by letters of the ordinary before action taken againſt him, this ſhall change the action; note the diverſity by the beſt opinion; & adjornatur. Br. Executors, pl. 167. cites 2 R. 3. 20.

6. *Adminiſtration granted to an executor de ſon tort*, how he ſhall be charged, ſee Keilw. 127. pl. 91.

2 Mod. 168. Hill. 28 & 29 Car. 2. C. B. Singleton v. Bawtree, S. P.

7. Executor de ſon tort *cannot be where there is a rightful executor*. Chan. Caſes, 33. Mich. 15 Car. 2. Eyre v. Eyre.

8. Debt upon bond entered into by the teſtator againſt the defendant as executor. The defendant *pleads that the teſtator made A. and C. infants his executors, and that adminiſtration durante minore ætate was committed to their father, who adminiſtered before the day of the writ brought.* The plaintiff *replies, that goods of the teſtator's, to the value of 500 l. came to the defendant's hands*, &c. And upon this the defendant demurred, and the plaintiff had judgment,

ment. Freem. Rep. 122. pl. 144. Trin. 1673. Kellow v. Weſtcomb.

9. Upon a trial at niſi prius at Guildhall before Ld. Ch. J. North, in trover and converſion againſt an executor de ſon tort, the queſtion came to be, *whether the goods having been taken in execution upon a judgment obtained againſt the defendant, by a creditor of the deceaſed, ſhould diſcharge him againſt the plaintiff who brought this action as adminiſtrator?* and the opinion of the Ch. J. was, that this execution was a good diſcharge againſt another creditor that ſhould ſue him, to whom he might plead riens inter ſe mains, but it was no diſcharge againſt an adminiſtrator, for men muſt not be encouraged to meddle with a perſonal eſtate without right; but to prevent this miſchief where the party dies inteſtate, and there is conteſt about the adminiſtration, a man may procure of the ordinary *letters ad colligendum.* Vent. 349. Trin. 33 Car. 2. B. R. Anon.

## (F. a) Who ſhall be chargeable as Executors.

[1. AN executor de ſon tort ſhall be *bound to pay legacies* as well as rightful executors. Mich. 3 Ja. B. R. per Popham and Williams. Hill. 7 Ja. B. between PHILPOT and others, per Curiam, prohibition denied upon ſuch ſuit.]

S. P. held accordingly by Popham and Williams, but Yelverton doubted it. Noy, 13. in a note.

[2. If a feme *executrix takes baron who waſtes* the goods, and feme dies, *by the common law there is no remedy againſt the baron.* Mich. 3 Ja. B. R. per Popham and Williams.]

[3. But in this caſe the *baron* ſhall be *puniſhed by the eccleſiaſtical law*, and compelled to make execution. Mich. 3 Ja. B. R. per Popham and Williams. Mich. 8 Ja. Prohibition denied.]

[4. If an *executor waſtes* the goods and dies, *his executor ſhall not be charged* for this. For *actio perſonalis* moritur cum perſona. H. 7 Ja. B. Held.] [ 219 ]

Fol. 920. Not even in the caſe of the king. 3 Le. 241. pl. 334. Mich. 32 Eliz. in the Exchequer. Tuck's caſe.—— Altered by 30 Car. 2. cap. 7. 4 & 5 W. & M. cap. 24. ſ. 12. which are conſtrued to extend to executors of rightful executors. 3 Mod. 113. Hill. 2 Jac. 2. B. R. Holcomb v. Petit.

[5. If an *executor de ſon tort waſtes* the goods and dies, his executor ſhall not be charged. Held. 7 Ja. B. Becauſe *actio perſonalis* moritur cum perſona.]

An executor de ſon tort was not liable at law, but Ld. Chancellor ſaid he would relieve againſt him in equity. 2 Mod. 293, 294. Hill. 29 & 30 Car. 2. in Cam. Scacc. before the Ld. Chancellor, the Ld. Treaſurer, and the two Chief Juſtices. Anon.—— But he is now made chargeable by ſtat. 30 Car. 2. cap. 7. and that ſtatute is made perpetual by 4 & 5 W. & M. cap. 24.

6. Where *executor by right, or* executor by *tort, adminiſters*, and after *refuſes before the ordinary, and takes the adminiſtration*, this may change the action in caſe of executor by tort. Br. Adminiſtrator, pl. 43. cites 2 R. 3. 20.

7. If *lawful executor male-adminiſters*, viz. convertens bona ad proprium uſum, he ſhall be charged and be executor per tort. D. 167. a. pl. 12. Hill. 1 Eliz.

8. *Executor, with intention to defraud the creditors, refuſed* the executorſhip, but cauſed J. S. to take upon him letters of adminiſtration; J. S. fraudulently *gave teſtator's goods to the executor*. Per Dyer, if the gift be fraudulent, then by the ſtatute of 13 Eliz. the gift is void, and then the executor, by the occupation of the goods, is executor de ſon tort, and judgment accordingly, contrary to the opinion of Manwood. 3 Le. 57. pl. 83. Mich. 15 Eliz. C. B. Anon.

If a fraudulent ſale be made of goods by A. and then A. dies inteſtate; thoſe goods in the hands of the vendee are liable to creditors, and he is chargeable as executor de ſon tort. Cro. J. 270, 271. pl. 3. Hill. 8 Jac. B. R. Hawes v. Leader.——Brownl. 111, 112. S. C.——Yelv. 196. S. C. adjudged.——The donee after the donor's death took the goods, and in an action brought againſt him as executor, in which he pleaded ne unques executor, the jury found the deed of gift of all his goods to the defendant, and alſo that it was to defraud creditors, contra formam ſtatuti, and that the defendant by colour of this deed took the goods after the donor's death; and by all Court judgment was given againſt the defendant as executor de ſon tort. Goldſb. 116. pl. 12. Mich. 39 & 43 Eliz. Kitchin v. Dixon.——S. C. cited Noy, 69. in a caſe where in debt againſt one as executor de ſon tort the defendant pleaded the ſame plea, and being found againſt him, execution was awarded againſt him for the whole debt, viz. 60l. for his falſe plea, though in truth he had not meddled but with one bedſtead of a ſmall value.——Noy, 69. ſays, it was ſaid by Daniel, that in 39 & 40 Eliz. C. B. Kitchen v. Dixſon, that one Mr Offlye for ſuch a falſe plea was charged to 100l. and he had meddled but with one bible. Therefore beware, and plead well the ſpecial matter.

9. Goods *given by the inteſtate by deed*, where there are not ſufficient left for payment of *debts*, will render the *donee* liable to be charged as executor of his wrong. 2 Le. 223. pl. 284. Hill. 16 Eliz. C. B. Stamford's caſe.

It is at the election of the plaintiff to ſue him as executor or adminiſtrator. 21 H. 6. 8. 2 R. 2. 20. 18 E. 4.—Arg. 2 Show. 373. cites Williamſon v. Norwich.—2 Vent. 180. Arg. cites S. C.

10. If one takes inteſtate's goods, and *pending the action againſt him*, he *takes letters of adminiſtration*, this ſhall not abate the writ. Arg. Ow. 69. Trin. 42 Eliz. in caſe of Malloy v. Jennings. Per Warburton J. Ow. 132. in caſe of Bethel v. Stanhope, cites 9 E. 4. 33

2 And. 172. pl. 95. S.C. adjudged.—Ow. 132. S. C. adjudged accordingly. *[220]

11. Scire facias upon a judgment againſt the teſtator of 200l. The caſe was, the *teſtator was poſſeſſed of goods to the value of 250l. and by covin to defraud the creditors, made a gift thereof to his daughter, * with condition upon payment of 20s. it ſhould be void, and died*; the defendant intermeddled with the goods, and afterwards *the daughter by this gift took the goods*, and *afterwards adminiſtration of teſtator's goods was committed to the defendant*; adjudged, that when he intermeddled with the goods, though he was neither executor nor adminiſtrator, and that after adminiſtration was committed to him, a creditor had election to charge him as executor of his own wrong, or as adminiſtrator, and that the gift was fraudulent within 13 Eliz. and when the donee afterwards took them, it was a treſpaſs to the adminiſtrator, and he had his remedy at law againſt her, ſo as they were aſſets in the defendant's hands. Cro. E. 810. pl. 16. Hill. 43 Eliz. C. B. Bethell v. Stanhope.

And where the goods ſo taken never actually

12. Though there be an *adminiſtering executor*, yet if *a ſtranger takes the goods*, and *claiming to be executor*, pays debts or pays legacies, and intermeddles as executor; there by ſuch expreſs adminiſtration

miniſtration as executor, he may be charged as executor de ſon tort, though there be other executors of right. Rep. 34. a. Trin. 2 Jac. C. B. Read's caſe, and ſays that with this agrees 9 E. 1. 13. 5. where this taker becomes executor. Went. Off. Ex. 175, 176. ——— Judgment was obtained againſt the teſtator, and upon a devaſtavit returned againſt the executor he pleaded, and a ſpecial verdict was found to this effect, That the defendant was made executor by the will, and dwelt in the ſame houſe with him; and that before probate he poſſeſſed himſelf of the teſtator's goods, and had them appraiſed and inventorized, and then ſold part, and paid a debt owing by the teſtator, and converted the value of the reſt to his own uſe; that afterwards he refuſed before the ordinary, whereupon adminiſtration was granted to the widow of the deceaſed; and the queſtion was, Whether he ſhould be charged to the whole value of the perſonal eſtate, or only for ſo much as he converted. The Court was of opinion, that the committing of adminiſtration in this caſe is a mere void act. If an adminiſtrator brings an action it is a good plea to ſay, that the executor made by the will has adminiſtered. Accordingly judgment was given for the plaintiff. Mod. 213. Paſch. 28 Car. 2. C. B. Parten v. Baſeden. ——Freem. Rep. 151. pl. 172. Parſons v. Mayeſden. S. C. The Court ſeemed to make a difference when goods are in the houſe of the perſon named executor, this poſſeſſion ſhall not amount to an adminiſtration, but perhaps there may be a difference when he takes them into his poſſeſſion. And here although he pleaded that he took the goods by the conſent of the party to whom adminiſtration was afterwards granted, that ſignified nothing, it being before adminiſtration granted. Adjornatur.

come to the executor's hands, but were in a remote place

13. If *executor durante minore ætate waſtes the goods*, he ſhall be charged after the age of infant *upon the ſpecial matter*, and not as executor of his own wrong, becauſe he had a lawful authority at that time. Agreed per Doderidge and Jones. Noy, 86. Palmer v. Litherland.

Lat. 160. Trin. 2 Car. S. C. accordingly by Doderidge and Jones, who held that he ſhould be charged upon the ſpecial matter.

14. *Adminiſtrator gets judgment*, then adminiſtration is revoked, if he takes execution, he ſhall be charged as executor de ſon tort. 1 Mod. 62. pl. 5. Trin. 22 Car. 2. B. R. Turner v. Davis.

15. If goods come to the poſſeſſion of an adminiſtrator, and his *adminiſtration is repealed*, he ſhall be charged as executor of his own wrong. Per Keeling Ch. J. Mod. 63. pl. 5. Trin. 22 Car. 2. B. R. in caſe of Turner v. Davis.

Arg. Raym. 23.

16. An *executor waſted* the goods of the teſtator, *and died, leaving aſſets, and the defendant his executor*, and if he ſhall be charged for the aſſets, was the queſtion; and Hale held *it a perſonal wrong, which died with him that did it*; but upon the importunity of Saunders, of counſel for the plaintiff, he permitted it to be found ſpecially; 2 Lev. 110. at Guildhall before Hale Ch. J. Trin. 26 Car. 2. Brown v. Collins, and Paſch. 27 Car. 2. it was adjudged according to the opinion of Hale, per tot. Cur. waſtes upon a ſurmiſe only of a devaſtavit without any return by the ſheriff. ——— But in ſuch * caſe Turner Ch. B. held ſtrongly that the executors of the executor de ſon tort ſhould be charged; for the firſt executor having the goods, the tort of the waſting ſhall not die with him, but ſhall charge his executors, contrary to the opinion in the caſe of Brown v. Collins in B. R. 2 Lev. 133. Paſch. 27 Car. 2. in the Exchequer. Aſtry v. Nevit.

Freem. Rep. 392. pl. 506. S. C. held accordingly; but it was held that an action of debt would lie againſt the executor that

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## (F. a. 2) De ſon Tort.

### Where he may retain, or Allowances be made him.

5 Rep. 30. S. C.—Cro. E. 630, 631. pl. 36. Ireland v. Coulter. S. C. adjudged.——Godb. 217. pl. 213. Mich. 11 Jac. C. B. Bond v. Green.

1. AN executor cannot *pay himſelf debt or legacy*, per omnes juſt' Angliæ. Mo. 527. pl. 696. Hill. 40 Eliz. Colter v. Ireland.

S. C. cited 2 Jo. 154.—Mo. 527. Colter v. Ireland.—D. 2. pl. 3. Marg.——If after action commenced againſt him he takes letters of adminiſtration, he may retain and plead it, but ſhall not abate the writ. Arg. 2 Show. 373. in caſe of Loveday v. Young, cites the caſe of Williamſon v. Norwich.——S. C. cited 2 Vent. 180. in caſe of Pyne v. Woolland.——For by taking adminiſtration he has purged the tort, and though executor de ſon tort cannot pay himſelf, yet he may pay others, and after taking out adminiſtration he may plead plene adminiſtravit. Sid. 76. pl. 9. Paſch. 14 Car. 2. B. R. Per Windham J. in caſe of Baker v. Berriſford.

2. Executor de ſon tort cannot *retain* for his own debt, though he is liable to the actions of creditors. Poph. 125. Trin. 15 Jac. B. R. Brook's caſe.

3. Executor de ſon tort was *indebted to the inteſtate* for ſeveral rents, and the *inteſtate acknowledged himſelf ſatisfied* for all rents due by defendant. This was held a good *diſcharge*, being in his life-time, and ſo not chargeable with it as aſſets in debt on bond, but where he had *paid money for ſo many blacks inteſtate appointed to be uſed at his funeral*, it was diſallowed and held no good adminiſtration. Clayt. 39. pl. 66. Aug. 11 Car. coram Barkley J. Legard v. Linley.

4. A *widow poſſeſſed* herſelf of ſome of the perſonal eſtate of her late huſband, and *paying juſt debts*, and that *in order* of payment out of his eſtate in her hands, ſhall have allowance for the ſame from the executor. Chan. Caſes, 33. Mich. 15 Car. 2. Ayre v. Ayre.

Upon a general iſſue pleaded ſuch payment ſhall be recouped in damages. Per Holt Ch. J. Skinn. 174. Whitehall v. Squire.——Went. Off. Ex. 181. takes this difference, that this payment ſhall ſtand as againſt other creditors, but not as againſt the rightful executor or adminiſtrator, for then any ſtranger might uſurp the office of executor, and take from him that liberty to prefer creditors in payment, and alſo from the executors power to pay himſelf before others in caſe of a debt due to him, which would be unreaſonable.

5. Executor de ſon tort ſhall *be allowed* all payments made to any but himſelf; Arg. (and not denied, but ſeemed to be granted by the Court). Chan. Caſes 33. Mich. 15 Car. 2. in caſe of Ayre v. Ayre.

1 Salk. 295. pl. 2. S. C. held accordingly, and the defendant had judgment.

6. A. died inteſtate. B. deſired C. to bury A. and he would pay him the charges. C. buried A.—*B. gave C. a horſe of inteſtate's in part of ſatisfaction of funeral charges*, and a note under his hand to pay him 23l. more. Afterwards *B. took adminiſtration and brought trover for the horſe*; Holt Ch. J. thought the action lay well;

well; but Dolben and Eyre Juſtices contra. 3 Mod. 276. Paſch. 2 W. & M. in B. R. Whitehall v. Squire.

—3 Salk. 161. pl. 7. S. C. held accordingly. ——Carth. 103. S. C. held accordingly, and judgment for the defendant. ——* There being no creditors in the caſe, and the funeral being by the direction of B. this makes him executor de ſon tort, and it being a lawful act though done by executor de ſon tort, it ought to be allowed; but if there were creditors perhaps it might be otherwiſe. Per Dolben and Eyre Juſtices. Skin. 274. S. C. ——Ibid. Holt Ch. J. ſaid, that though legal acts done by an executor de ſon tort are good, ſo that he ſhall not be reſponſible to creditors when he has paid all to others upon ſpecialties, or other ſecurity of a real nature, yet he is liable to the rightful adminiſtrator to be puniſhed, for his tortious intermeddling, in an action of trover, in which damages ſhall be recovered, but not according to the value of the goods, becauſe that which he has lawfully paid ſhall be recouped.

7. The widow of an inteſtate who had *bona notabilia* took out *adminiſtration in the biſhop's court of Exeter* inſtead of the prerogative court; by virtue of this adminiſtration ſhe entered upon a term, and *paid ſome debts* of inteſtate's by perception of profits, and afterwards *mortgaged the term to pay a bond-creditor*, and then died inteſtate. Adminiſtration was granted *de bonis non*, becauſe though the wife had a right to adminiſter, yet ſhe took out a wrongful adminiſtration, and now the queſtion was, who ſhould redeem? whether the adminiſtrator of the wife, or the adminiſtrator de bonis non of the huſband? And it was decreed that the adminiſtrator de bonis non ſhould *redeem*, but that he ſhould *allow* what the wrongful adminiſtratrix had paid in diſcharge of the juſt debts of her huſband the inteſtate. Neſſ. Chan. Rep. 173. Mich. 1691. Armſtrong's caſe.

## (F. a. 3) Executor de ſon Tort.

### Actions brought by or againſt him.

1. EXecutor de ſon tort never ſhall have action as executor of teſtator; Arg. 2 And. 39. pl. 25. Trin. 38 Eliz. in caſe of Baniſter v. Truſſell.

2. Executor de ſon tort ſhall be *ſued for legacies* as well as a lawful executor; per Popham and Williams; but Yelverton doubted of it. Noy, 13. Anon.

3. *A man made* his will and *an executor*, and *adminiſtration is granted to another*, and by virtue thereof the *adminiſtrator gets the poſſeſſion of the goods*. The *executor proved the will, and brings an action of treſpaſs* againſt the adminiſtrator *for taking the goods*. The whole Court held clearly that the action well lies. 2 Bulſt. 268. Mich. 12 Jac. Fiſher v. Young.

4. *Executor de ſon tort of a term* is chargeable *in waſte*. 3 Lev. 35. Mich. 33 Car. 2. C. B. Mayor, &c. of Norwich v. Johnſon.

S.C. 3 Mod. 90. Hill. 1 Jac. B. R. it was objected in error, that if the plaintiff is intitled to this action, it muſt be by the ſtatute of Glouceſter, but that it will not lie againſt the defendant even by that ſtatute, becauſe the action is thereby given againſt the tenant by the curteſy, in dower, for life or years, and treble damages, &c. and that the defendant is neither of theſe; and that it being ſo penal a law ſhall be taken ſtrictly; but per Cur. this is a remedial and yet a penal law, and therefore ſhall have a favourable conſtruction; and the judgment was affirmed. ——Comb. 7. S. C. and judgment affirmed accordingly. ——2 Show. 457. pl. 423. S. C. and judgment affirmed.

Freem. Rep. 218. cites S. C.—— 2 Mod 147. S. P. Arg. in case of Abraham v. Cunningham.

5. *Debt lies against* an executor de son tort of a term; Arg. 2 Mod. 174. in case of Loyd v. Langford, cites Porter v. Sweetman, Trin. 1653. B. R.

——Saund. 218. S. P. Arg. in case of Wheatley v. Lane.

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6. One as executor de son tort brought *scire facias on judgment had by the testator*, and *on two nihils, and after execution H. as administrator brings scire facias on the same judgment*, as per Cur. he may, and recover the money all over again, as by Twisden hath been before, 15 Car. 1. and the party is left to his remedy against the pretended execution. Keb. 420, 421. pl. 140. Mich. 14 Car. 2. B. R. Harrison v. Vandibeck.

7. It has been divers times held, that where there is a *right executor*, and yet another does administer by wrong, it is at the *election* of creditors, either *to sue them jointly* together, *or* one or both of them *severally*, and by himself; *but* if where *administration* is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receives that power from the ordinary can so be; therefore in that case there is a necessity of suing him a-part and by himself (who so usurpeth administration) by the name of an executor. Went. Off. Ex. 177.

3 Lev. 35. S. C. in C. B. held accordingly.

8. *Waste lies against* an executor de son tort of a *term*. 3 Mod. 93. Hill. 1 Jac. 2. B. R. Mayor of Norwich v. Johnson.

——Comb. 7. S. C. and judgment in C. B. affirmed in B. R.——2 Show. 457. pl. 423. S. C. and judgment affirmed.

9. If executor de son tort gets 300l. of the testator's goods, and *pays* it duly *to a just creditor*, there the lawful executor, in my opinion, shall not even maintain *trover* against a wrongful executor, because it is a good payment, and no prejudice to the executor; per Holt Ch. J. 12 Mod. 472. Pasch. 13 W. 3. in case of Parker v. Kett.

## (F. a. 4) Executor de son Tort.

### Pleadings by or against him.

Where no administring at all is confessed, such a traverse of not administring in such manner is dissonant, and not legal. Went. Off. Ex. 173.

1. AN *overseer* or conductor, or he that has only *letters ad colligend'*, viz. to get and keep the goods in safety, and he that *intermeddles by virtue of a will truly made, but controlled by a later will, after* found and proved, may free himself from being executor of his own wrong, by special pleading how and in what right he intermeddled, and *traversing his administering in other manner*. D. 166. b. pl. 11. Hill. 1 Eliz. Stokes v. Porter.

——Mo. 14. pl. 53. Mich. 5 & 6 P. & M. the S. C. but S. P. does not appear.——And. 11. pl. 23. S. C. but S. P. does not appear.

2. *But*

2. *But* where a man *claims title* or intereſt in the goods, *as by the gift of teſtator in his life*, he ſhall not *traverſe* without that that he adminiſtered any other goods or in any other manner, but *abſque hoc, that he adminiſtered as executor*. D. 167. a. pl. 11. Hill. 1 Eliz. in caſe of Stokes v. Porter.

3. If executor de ſon tort *pleads plene adminiſtravit* to an action of debt brought againſt him, if he can prove that he *himſelf adminiſtered part, and the adminiſtrator the reſidue*, the ſame is good *evidence* to maintain his iſſue; per Drew Serjeant, which Periam J. [ 224 ] ſeemed to grant; but by him a rightful executor, who intermeddles and after refuſes, upon which adminiſtration is granted, cannot plead ſo, for ſuch adminiſtration is not well granted. Le. 155. pl. 215. Trin. 32 Eliz. C. B. in caſe of Hawkins v. Lawes.

4. In debt againſt J. S. as executor, he *pleads ne unques executor*. The *verdict found that adminiſtration* of the goods of the teſtator *was committed to the wife of the defendant, and that ſhe is dead, and he detained bonam partem of the goods, and ſold them*. It was moved that this verdict was void for uncertainty; for bonam partem is altogether uncertain; but it was held well enough; for *if he detain any part*, it makes him executor de ſon tort, &c. and judgment for the plaintiff. Cro. Eliz. 472. pl. 27. Hill. 38 Eliz. B. R. Anon.

5. If executor de ſon tort be *ſued with a rightful executor, in one and the ſame writ*, the executor de ſon tort ſhall not by this plea prejudice the rightful executor; per the Chief Juſtice. Brownl. 78. Trin. 10 Jac. in caſe of Lany v. Aldren. S. P. Arg. 2 Brownl. 186. Arg. in S. C.

6. In action againſt ſuch executor, he is not to be diſtinguiſhed by name from the right executor, but muſt be *ſued generally by the name of executor of the laſt will and teſtament* of the deceaſed, and then if he will deny himſelf ſo to be, he muſt *plead, that he neither is executor, nor hath adminiſtered as executor*; and then the plaintiff muſt prove that he hath adminiſtered in ſome ſuch or the like ſort as aforeſaid. Went. Off. Ex. 176, 177.

7. *M. the mother poſſeſſed herſelf of the goods of the inteſtate, as executrix de ſon tort, and ſells them by aſſent and direction of J. her ſon*, afterwards *J. took out adminiſtration, and paid the debts as far as the perſonal eſtate did amount unto, being to the value of what M. received, and of all which the inteſtate died poſſeſſed*; then *one of the creditors ſued M. as executor de ſon tort, and upon plene adminiſtravit pleaded, all this matter was found ſpecially*; and adjudged by all the barons, that ſhe was not liable to the ſuit of the creditor, becauſe it was brought after adminiſtration granted to J. her ſon, and in ſuch caſe ſhe is chargeable to him, and not to the creditors; for if ſhe ſhould, ſhe might be doubly charged, which is unreaſonable, eſpecially ſince the adminiſtrator had paid to the value of the eſtate. Cro. Car. 88. pl. 10. Mich. 3 Car. in Scace. Whitmore v. Porter. But if the action had been brought againſt her before the adminiſtrator had fully adminiſtered all in debts, peradventure it might have been otherwiſe; for by taking the goods into her hands ſhe is chargeable for them as executrix de ſon tort till ſhe ſatisfies the true adminiſtrator for them, or that ſhe ſatisfies for the true debt to the value; and judgment for the defendant. Cro. C. 89. Mich. 3 Car. in caſe of Whitmore v. Porter. S. C.

8. The *plaintiff declared againſt R. the defendant as executor*, who *pleaded that teſtator made his will, and that he, ſuſcepto ſuper ſe onere teſtamenti præd'*, &c. *did pay ſeveral ſums due on ſpecialties, and that there was a debt owing by the teſtator to the defendant's wife, and that he retained ſo much* of the teſtator's goods to ſatisfy that debt, *and that he had no other aſſets*; the plaintiff demurred, becauſe, for aught appears, the defendant was executor de ſon tort, and if ſo, he cannot retain. The plaintiff's naming him in his declaration (executor of the teſtament of, &c.) will not help him, for he cannot declare againſt him any other way. And of that opinion was all the Court, and adjudged accordingly for the plaintiff. 1 Mod. 208. pl. 39. Trin. 27 Car. 2. C. B. Atkinſon v. Rawſon.

9. A *creditor* of the inteſtate brought action againſt executor de ſon tort, and obtained judgment, and the goods were taken in *execution*. Per North Ch. J. this is a good *diſcharge againſt another creditor* that ſhould ſue him, to whom he might plead *riens enter*
[ 225 ] *mains*, but it is no diſcharge *againſt an adminiſtrator*; for men muſt not be encouraged to meddle with a perſonal eſtate without right; but to prevent the miſchief where there is conteſt about the adminiſtration to the inteſtate, a man may procure of the ordinary *letters ad colligendum*. Vent. 349. Trin. 32 Car. 2. B. R. Anon.

10. An executor de ſon tort poſſeſſed himſelf of the goods, &c. *A creditor of the inteſtate got judgment* againſt him, *and took the goods in execution*, againſt whom the *rightful adminiſtrator brought an action of trover for the ſame goods*; North Ch. J. held that *the ſaid execution did not diſcharge him of the action of trover*; it might be a good diſcharge againſt any other creditor of the inteſtate, and he might plead riens enter mains, but not againſt the rightful adminiſtrator; for men muſt not meddle with the perſonal eſtate of others without any right. 1 Vent. 349. 32 Car. 2. at niſi prius at Guildhall. Anon.

11. If executor de ſon tort *deliver the goods to the adminiſtrator* before action brought, he may plead plene adminiſtravit. Farr. 31. Trin. 1 Ann. B. R. Anon.

12. Where *trover* is brought by a rightful executor or adminiſtrator *againſt an executor de ſon tort*, he cannot *plead payment of debts to the value, &c. or that he hath given the goods in ſatisfaction* of the debts; becauſe no man ought to obtrude himſelf upon the office of another; nevertheleſs, upon the *general iſſue*, ſuch *payments ſhall be recouped in damages*; per Holt Ch. J. Carth. 104. Hill. 2 W. & M. in B. R. in caſe of Whitehall v. Squire.

Keb. 283. cites the caſe of Tell Long.

13. But in an action by a creditor againſt an executor de ſon tort, he may plead *plene adminiſtravit to an action* brought *by a creditor, and* may *give in evidence payment of juſt debts* to others; but in action *by a rightful executor or adminiſtrator*, he cannot plead ſo; per Holt Ch. J. Carth. 104. Hill. 2 W. & M. in B. R. in caſe of Whitehall v. Squire.

## (G. a.) What ſhall be ſaid Aſſets.

[1. IF a man *enfeoff* another *upon condition* that he ſhall *ſell the land, and expend the money for his ſoul*, &c. this ſhall not be aſſets after the death of the feoffor where the ſame *feoffee is made executor*. * 2 H. 4. 21. b. Dubitatur † 3 H. 6. 3. b.]

* Fitzh. Executors, pl. 51. cites S. C.—— S. C. cited Arg. Le. 225. as adjudged. † S. C. cited Arg. Le. 225.

[2. But if a man *makes J. S. executor, and after enfeoffs him to ſell the land, and diſtribute the monies for his ſoul*, and after dies, and after he ſells, theſe monies ſhall be aſſets. 3 H. 6. 3. b.]

Br. Aſſets enter mains, pl. 2. cites S. C.—— Fitzh. Executors, pl. 1.

[3. So if a man *deviſes land to J. S. to be ſold, and to diſtribute the money for his ſoul*, and at the ſame time *makes him executor*, and dies, and after he ſells, theſe monies ſhall be aſſets, though they never were in the hands of the teſtator. 3 H. 6. 3.]

Br. Aſſets enter mains, pl. 2. cites S. C.—— Fitzh. Executors, pl. 1.

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[4. If executor *recovers damages* in treſpaſs *de bonis aſportatis in vita* teſtatoris, this ſhall be aſſets, becauſe he recovers it as executor. 3 H. 6. 3. b.]

S. P. though they were not the goods of the deceaſed at the time of his death; and if they find more than aſſets this is a good verdict. Br. Aſſets enter mains, pl. 2. cites S. C.——S. C. cited Le. 225. in pl. 306.

Though an obligation ſhall not be aſſets in the hands of the executor before the recovery, yet becauſe he may gain benefit from it, it ſhall be valuable; and therefore if an obligation be taken from the teſtator, the executor ſhall have treſpaſs by the ſtatute 4 E. 3. to recover damages which ſhall be aſſets. Sav. 119. pl. 188. 29 Eliz. per Cur. obiter.

[5. If an executor *recovers, as executor*, things *in Chancery by equity*, theſe things ſo recovered ſhall be aſſets. Trin. 12 Ja. B. adjudged, HARWOOD AGAINST WRAYNAM, Trin. 12 Ja. B. R. per Curiam.]

Roll. Rep. 56. pl. 32. S. C. cited as adjudged. —Brownl. 76, 77. Harcock v. Wrenham. S. C. and held to be aſſets.——Mo. 858. pl. 1178. Harecourt v. Wrenham. S. C. & S. P. agreed per omnes.

[6. If a man *deviſes land to be ſold by J. S. for payment of his debts and legacies*, and *makes J. S. his executor*, and dies, the *money made by J. S. upon the ſale* of the land ſhall be aſſets in his hands. Tr. 17 Ja. B. per Hobart.]

If lands are deviſed to executors for three years for payment of debts, this is aſſets in the executor's hands; but if I deviſe my land to be ſold for payment of my debts, it is no aſſets before it is ſold. Brownl. 34. Paſch. 14 Jac.——2 Brownl. 46. S. P.——But when ſold the money is aſſets at common law without going into Chancery. Per Twiſden J. Lev. 224. Mich. 19 Car. 2. Dethick v. Caravan, alias Curwin.——Ibid. 225. Arg. S. P. in caſe of Alexander v. Greſham, and cites D. 264.——Hardr. 405. Paſch. 17 Car. 2. in the Exchequer, Burwell and Salter v. Corrant, S. P.

[7. But otherwiſe it is where the *land is deviſed to be ſold by the executor and others*, for there the money ſhall not be aſſets; for *they are not truſted* with it *as executors*. Ibid. per Hobart.]

[8. If

Br. Aſſets enter mains, cites S. C. but not S. P.

[8. If *executor delivers goods to merchandize*, the profit of this ſhall be to the uſe of the teſtator. 18 H. 6. 4.]

——S. P. and they ſhall be as aſſets, and he cannot plead plene adminiſtravit as long as he has this increaſe in his hands; per Babington. Br. Executor, pl. 162. cites 11 H. 6. 35.——Br. Aſſets enter mains, pl. 9. cites S. C.

If executor makes gain of the teſtator's money, ſuch gain ſhall be aſſets. Brownl. 77. Hill. 11 Jac. in caſe of Harcock v. Wrenham.

G. brought debt upon a bond againſt A. as executor, and the caſe was, that

[9. If a man *deviſe land* held in ſocage *to be ſold by his executor*, and that the *monies* thereof ariſing ſhall be *diſpoſed in legacies ſpecially expreſſed* in the ſame will, if the executor after his death ſells the land for money, the money ſhall be aſſets in his hands to the legatees. D. 9 Eliz. 264. 41. per Cur.]

the teſtator of A. by his will did appoint certain lands, and named which ſhould be ſold by his executors, and monies thereof ariſing diſtributed amongſt his daughters when they have accompliſhed their ages of 21 years. The lands are ſold. The queſtion was, if the monies thereof, being in the hands of the executors until the full age of the daughters, ſhall be aſſets to pay the debts of the teſtator? And by the clear opinion of the whole Court the ſame ſhall not be aſſets, for that this money is limited to a ſpecial uſe. Le. 87. pl. 107. Mich. 29 & 30 Eliz. C. B. Germy's caſe.——4 Le. 82. pl. 174. S. C. in totidem verbis.——2 Le. 119. pl. 163. Gering's caſe, S. C. in totidem verbis, but adds a quære of this caſe; for it was afterwards reſolved in another caſe, that the monies in the like caſe remaining in their hands ſhould be aſſets.

All. 21. S. C. but S. P. does not fully appear.

[10. So if a *deviſe* be of ſuch *land to his executor upon condition to ſell it*, and that the *monies* accruing thereupon, *and alſo with* * *his perſonal eſtate to pay his debts*, and by the ſame will *gives power to the executors to ſell* it accordingly, &c. and after the executors ſell it accordingly, the monies received upon the ſale ſhall be aſſets *to the debts*; adjudged upon a ſpecial verdict. Trin. 23 Car. B. R. Shaw against Huntley. Trin. 21 Car. Rot. 321. London.]

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[11. If debtee dies inteſtate, and the ordinary commits *adminiſtration to debtor*, by which the debt is extinct, yet this ſhall be aſſets in his hands. Trin. 7 Ja. B. per Curiam agreed; for the ordinaty has no power to diſcharge the debt.]

[12. If the *debtee makes the debtor and a ſtranger executors*, by which the debt is extinct in the hands of the debtor, yet this ſhall be aſſets in his hands to the debts; for this is extinct but by the will. 8 E. 4. 3. Pl. C. 185. Woodward against Darcy.]

* Fol. 521.

[13. So if *debtee makes debtor executor* and dies, by which the debt is * extinct in the hands of the debtor, yet this ſhall be aſſets becauſe it is extinct but by the will. Held. Trin. 7 Ja. B. Holyday against Boas.]

The debt is not extinct though the action is gone; for it ſhall be aſſets. Mo. 507. Arg. cites 4 E. 6.——Yelv. 160. Mich. 7 Jac. B. R. Flud v. Ramſey, S. P. held accordingly.

[14. If the *teſtator was indebted* to the king in 13l. and the king *ſeiſes the goods* of the teſtator *in the hands of the* executor for the ſaid debt, and after the *executor pays* the 13l. and has the *goods re-delivered*, the *value of the goods over the ſum* of 13l. ſhall be aſſets to other debts. 17 E. 3. 26. b. admitted by iſſue.]

[15. If

[15. If a man makes A. his executor *during the minority of B.* and makes B. executor *after his full age*, and after B. comes to full age, and takes upon him the executorſhip of the will, the *goods* of the teſtator which are *in ſpecie in the hands of A. after the executorſhip of B.* are aſſets in the hands of B. though B. never had any poſſeſſion of them; for he may have trover and converſion for them againſt him. Trin. 17 Ja. B. per Curiam, CHANDLER AGAINST TOMSON.] Hob. 265, 266. pl. 349. S. C. but not exactly S. P.

16. If a man *has a term as executor, and purchaſes the franktenement*, &c. the leaſe is not extinct as to be aſſets, but it ſeems it ſhall be extinct as to the executor of the purchaſor to have it as a term. Br. Executors, pl. 174. cites 43 E. 3. 27, 28. S. P. and if it ſhall be extinct it ſeems to be a devaſtavit ad ultimum.

Br. Extinguiſhment, pl. 57. cites S. C. ——— Br. Extinguiſhment, pl. 54. the leaſe againſt the executor ſhall be aſſets; per Hales.

17. If a feme executrix takes baron, and the *feme ſells the goods and redeems them*, yet theſe ſhall remain as aſſets; per Newton. But Brook ſays, quære inde; for it ſeems that they ſhall not if they are *ſold bona fide*; for they do not remain now as the goods of the teſtator, but as goods altered and changed in property. Br. Executors, pl. 150. cites 18 H. 6. 4. Br. Property, pl. 50. cites Fitzh. Replication, 7. and 18 H. 6. 4. but Brook ſays it ſeems to him that the money ſhall be aſſets, but not the goods; for the property is changed without tort to any.

18. If a *man* be *indebted in* 20*l. to the teſtator*, this ſhall not charge the executor as aſſets, &c. This is in action and not in poſſeſſion. Br. Executor, pl. 112. cites 8 E. 4. 3. per Needham.

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19. *Advowſon* may be aſſets in the hands of an executor. Hob. 304. in caſe of London v. the Collegiate Church of Southwell. It ſhall be aſſets in formedon. Jo. 23. cites 5 H. 7. 37.

b. 9 H. 6. 57. a. 2 Roll. 774. 11. ——— But a preſentation to a church actually void ſhall not be accounted aſſets. R. S. L. 127. cites Went. Off. Ex. cap. 6.

20. Note per Fitzh. for clear law, that where a man is *indebted in* 40*l. to one, and* 30*l. to another*, and dies, and *has only* 40*l.* and his executors or *adminiſtrators agree with the one creditor of* 40*l. for* 10*l.* and has acquittance of the 40*l.* yet *the* 30*l. reſidue* in his hands *ſhall be aſſets* in his hands. Br. Aſſets enter mains, pl. 1. cites 27 H. 8. 6. Br. Executor, pl. 6. cites S. C.

21. If *two have a leaſe for years as executors* of J. S. and *they purchaſe the reverſion in fee*, the leaſe is extinct, and yet they ſhall be charged thereby as aſſets. Br. Leaſes, pl. 63. cites 4 E. 6. See Extinguiſhment, (A), pl. 9. and the notes there.

22. Brook ſays, it ſeems reaſonable that the executor ſhall be charged with ſo much as their teſtator lends, or upon a *pledge pledged to the teſtator in his life*; for when the owner redeems his pledge of the executor, *the ſum which the executor received by the redemption ſhall be aſſets* in his hands. Br. Aſſets enter mains, pl. 12.

23. If *money is brought into the prerogative court, and* there *delivered to the executor as due to the teſtator*, and *preſently after in the ſame*

*ſame court, by order thereof,* and the ſame day, *he pays it to the creditor* of the teſtator, and after ſuch payment, and upon the ſame day, *another takes out a writ,* upon plene adminiſtravit pleaded, this money will be taken to be aſſets, though perhaps *by ſpecial pleading the defendant might have been aided.* Dy. 208. pl. 16. Mich. 3 & 4 Eliz.

Cited 1 Rep. 98. b. in Shelly's caſe.

25. A. *covenants to make a leaſe for years to B.* Before the leaſe made *B. dies,* and the *leaſe is made to his executors,* though the term firſt commenced in the executors; yet ſince the covenant with B. was the cauſe of making the leaſe to the executors, the term is aſſets in the hands of the executors as well as if it had been made to the teſtator himſelf. Pl. C. 284. a. Trin. 6 Eliz. Chapman's caſe.

26. *Leaſe for years on condition to be void* on non payment of rent, the *condition is broken,* and then leſſee dies, it is not aſſets in the hands of the executor. 2 Le. 143. pl. 178. 13 Eliz. In the Exchequer, in Sir Moil Finch's caſe.

Where land is given to A. for life, and eight years after to his executors or aſſigns, or heirs, all is in the leſſee, for all is as one gift; but where it is to A. for life, and after his deceaſe the remainder to his executors, it is not aſſets in their hands, nor if he dies inteſtate, ſhall his adminiſtrator have it, and therefore the executors have it by purchaſe. Per Dyer Ch. J. 3 Le. 23. Ibid.

27. *Leaſe for life ſo as after his deceaſe* the land remain *to his executors for eight years,* after the deceaſe of leſſee for life the executors have the term as executors to the uſe of teſtator, and ſo aſſets. Per Manwood J. but per Dyer it is not aſſets; for though the executors have the ſame term by purchaſe, yet they have it as executors. For that is a good name of purchaſe, which Harper J. granted, and that 17 E. 3. 29. doth not prove the ſame. 3 Le. 21. pl. 49. Hill. 14 Eliz. in Cranmer's caſe.

28. A ſtranger was bound to the teſtator in 100l. for *performance of covenants,* which were broken, for which the *executors brought debt* upon the obligation, depending which ſuit, *both parties ſubmitted themſelves to the arbitrement of A. and B. who awarded, that the obligor ſhould pay to the executors* 70*l. in full ſatisfaction,* &c. *and that the executors ſhould releaſe,* &c. which was done accordingly. And it was agreed by the Court, that by the releaſe it ſhall be [ 229 ] taken in judgment of law, that the executors have aſſets to the value of the whole 100l. and although the executors were compelled by the award to make the releaſe; yet it was their own act to ſubmit themſelves to the arbitrement. 3 Le. 53. pl. 77. Mich. 15 Eliz. C. B. Anon.

28. *Goods diſtrained and impounded* are not aſſets to charge an executor. Adjudged. Cro. E. 23. pl. 8. Mich. 25 Eliz. C. B. Anon.

3 Le. 23. Per Dyer and Harper Juſtices, againſt Manwood J. in Cranmer's caſe.

29. A. *by deed limits a term to his executors for* 20 *years,* this ſhall not be aſſets in their hands. 2 Le. 7. pl. 7. 16 Eliz. C. B. in Cranmer's caſe.

30. *Dogs* are not aſſets. Arg. Ow. 94. Trin. 30 Eliz.

31. A.

31. A. ſeiſed in fee made a *leaſe of land and implements for years rendering rent to A. and his heirs and aſſigns;* but after A.'s death his *executors received the rent for ſome time*, yet this is not aſſets. See Trial (B. g), pl. 3. and D. 20 Eliz. 361. 15.

32. If a man leaſes for years, and the *executor of the leſſee ſurrenders* this leaſe, this ſhall be aſſets, though to ſome reſpects the term is extinct. 1 Rep. 87. b. Paſch. 22 Eliz. by Walmſley J. in Corbet's caſe.

33. Debt againſt an executor who pleads he had riens en ſes mains, but certain *goods diſtrained and impounded*, it was adjudged to be no aſſets to charge him. Cro. E. 23. pl. 8. Mich. 25 Eliz. C. B. Anon.

34. A. ſeiſed of land in fee *deviſed it to B. for* 31 *years for payment of debts*, &c. and makes B. executor. Afterwards, during the 31 years, *the fee deſcends on B.* Though by deſcent of the inheritance the term is merged as to himſelf, yet it is in eſſe as to creditors and legatees, and ſhall be aſſets in his hands; per Clerk J. 3 Le. 112. pl. 159. Trin. 26 Eliz. in the Exchequer, Vincent Lee's caſe, alias Lee v. Lee.

35. *Infant executor at his full age releaſes to his adminiſtrators durante minore ætate, who had aſſets of* 600*l. in their hands, all actions;* this 600 l. is now aſſets in his hands, and liable to pay the teſtator's debts; for the law preſumes that he received ſo much as he releaſes, and judgment for the plaintiff. Cro. E. 43. pl. 3. Mich. 27 & 28 Eliz. C. B. Brightman v. Keighley.

Godb. 29. pl. 39. Kittley's caſe, S. C. adjudged accordingly. 4 Le. 102. pl. 209. Kightley v. Kightley, S. C. adjudged accordingly. —— And. 138. pl. 189. Veghelman v. Kighley. S. C. adjudged.

36. If *treſpaſs* be done *to the teſtator by taking his goods, and he dies*, and the *executors releaſe all actions*, the ſame is aſſets; becauſe it might be proved to the jury, that if they had not releaſed, but had brought action of treſpaſs de bonis aſportatis in vita teſtatoris, they *might have recovered damages which would have ſatisfied the debts* or legacies of the teſtator, and therefore ſhall be aſſets; per Periam J. to which Rhodes agreed. 4 Le. 103. in pl. 209. Mich. 27 Eliz. C. B. in caſe of Kightley v. Kightley.

37. If an executor *releaſes an account*, and it is not certain what he ſhall recover, it is not aſſets; but if it can appear or be proved that ſo much was due, it is aſſets; for the law preſumes he has received ſo much as he does releaſe; per Periam J. and judgment pro quer'. Cro. E. 43. pl. 3. Mich. 27 & 28 Eliz. C. B. Brightman v. Keighley.

S. P per Periam and Rhodes J. 4 Le. 103. pl. 209. Mich. 27 Eliz. C. B. Kightley v. Kightley, S. C. —— If an executor releaſes a debt, or diſcharges one in execution, it ſhall be accounted in law aſſets as received; per Hobart Ch. J. Hob. 59. —— Ibid. 66. S. P. per Hobart Ch. J.

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38. If the teſtator *mortgages a term* and dies, and the *executors redeem it* with their own monies, the ſaid leaſe will be aſſets in their hands for ſo much as the ſame is worth above the ſum which they have paid for the redemption of it; per Periam J. Le,

So if A. had a leaſe for three lives from the church to him and

his heirs, and mortgaged it for 99 years if the three lives live ſo long, and died, the mortgage being forfeited; this mortgaged term (which would not have been aſſets at law) was decreed to be ſold for payment of debts. 2 Vern. 54. Arg. cites it as decreed in Ld. Nottingham's time, in Tooke's caſe.

Le. 155. pl. 215. Trin. 32 Eliz. C. B. in caſe of Hawkins v. Lawes.

39. If a man is *indebted by obligation in* 100*l. to a teſtator*, this *obligation is not aſſets in the hands of the executors* until it be recovered by them, becauſe it is but a choſe en action; but if in ſuch caſe the executor releaſes the debt, now he has determined the action, and has made it aſſets in his hands to the whole value of the bond. Ow. 36. Mich. 15 Eliz. Anon.

Ow. 99. S.C. & S.P. per Curiam. —— It was adjudged aſſets lately in the Houſe of Lords, and ſo a decree in Chancery affirmed; Arg. Gibb. 251.

40. By *recovery in quare impedit* for a diſturbance made to their teſtator, the executors ſhall recover *damages*, which ſhall be aſſets, and as an *advowſon* is aſſets in the heir, ſo a preſentment ſhall be to executors. Savil. 119. pl. 187. Paſch. 29 Eliz. Smallwood v. Biſhop of Coventry and Marſh.

Noy, 67. Endenne v. Feviſame, S. C. and agreed that it was not aſſets in the hands of B. for it was only of truſt and confidence between A. and J S. and there is no remedy but in Chancery.

41. The *queen was indebted to A. in* 100*l. for goods* delivered into the Tower, *for which money A. took a debenture* from the queen *in the name of J. S. and afterwards made B. his executor and died. B. procured J. S. to releaſe and ſurrender the former debenture* to the queen, *and took a new debenture* from the queen for the ſaid 100*l. to himſelf.* It was held that this was no devaſtavit in the hands of B. the executor, but it had been otherwiſe if the firſt debenture had been taken in A.'s own name, for then it had been a devaſtavit by the executor. Goldſb. 115. Mich. 40 Eliz. C. B. Eveling v. Leveſon.

42. If an executor has a *leaſe* for years of land of the *value of* 20*l. per ann. rendering* 10*l. rent* per ann. it is aſſets in his hands only for 10l. over and above the rent. Cro. E. 712. pl. 35. Mich. 41 & 42 Eliz. C. B. in caſe of Body v. Hargrave.

If ſuch taking be by ſubjects known; but if by enemies, as where enemies land and take goods or cattle near the ſea coaſt, it ſeems that the executor is not chargeable. Went. Off. Ex. 112.

43. *Goods wrongfully taken from executor* or adminiſtrator are aſſets, becauſe they may take them again, but goods taken from *teſtator* are not; per Warburton. Ow. 132. Hill. 43 Eliz. in caſe of Bethell v. Stanhope.

6 Rep. 46. b. Dowdale's caſe. S. C. reſolved that if the executor has goods of the teſtator in any part of the world he ſhall be charged in reſpect of them. —— S. C. cited Hardr. 64.

44. Aſſets *in Ireland are aſſets in England;* and judgment accordingly by three juſtices, contra Walmſley. Cro. J. 55. pl. 28. Mich. 2 Jac. C. B. Richardſon v. Dowell.

45. It ſhall not be *intended* that an executor has *ſpecial aſſets* (as money received for lands deviſed to be ſold for payment of debts, or damages recovered in treſpaſs for goods taken away in the life of the teſtator, &c.) unleſs it be ſpecially ſhewn. Cro. J. 132. pl. 4. Mich. 4 Jac. B. R. Gewen v. Roll and Noble.

46. *Goods taken away* wrongfully by a ſtranger *before the adminiſtration* ſhall not be aſſets in the hands of the adminiſtrator till they are recovered, or damages for them. Hob. 49. pl. 54. cites Trin. 11 Jac. Keble v. Keble and Oſbaſton. In teſtator's life-time ſo as they never were but a choſe en action

to the executor or adminiſtrator are not aſſets till recovered. Cro. E. 810. pl. 16. Hill. 43 Eliz. C. B. in caſe of Bethel v. Stanhope.

47. *Damages recovered* by an executor in all poſſeſſory treſpaſſes ſhall be aſſets in his hands. Hob. 38. cites Trin. 12 Jac. in caſe of Cope v. Lewin. 6 Mod 181. Trin. 3 Ann. B. R. in caſe of Jenkins v.

Plume, S. P. —— Le. 225. Arg. cites 3 H. 6. 3. —— Adminiſtrator brings debt and has judgment, defendant in execution eſcapes; damages recovered on the eſcape ſhall be aſſets. Savil. 130. Paſch. 36 Eliz. in Scacc. Hitchcock v. Skynner. —— S. P. Roll. Rep. 63. pl. 8. Mich. 12 Jac. B. R. Long v. Winſcomb. —— Damages recovered may be aſſets though never actually received as by being releaſed by executor. For this amounts to a receit, and charges the executor as to creditors with the whole penal ſum, ſuppoſing of a bond, &c. though perhaps the executor received part only as the principal or ſome like proportion. Went. Off. Ex. 70. —— Co. Litt. 124. a. S. P. —— Adminiſtrator brings debt and has judgment, defendant in execution eſcapes Damages recovered on the eſcape ſhall be aſſets. Sav. 130. Paſch. 36 Eliz. in Scacc. Hitchcock v. Skinner. —— S. P. Roll. Rep. 63. pl. 8. Mich. 12 Jac. B. R. Long v. Winſcomb.

48. If an *executor has a villein for years who purchaſes lands in fee*, and the *executor enters*, he ſhall have the whole fee ſimple, but becauſe he had the villein as executor it ſhall be aſſets in his hands. Co. Litt. 117. b. 124. a.

49. If *leaſes for years, horſes, ſheep, plate*, or other cattle be *granted to A. upon condition that if A. do not ſuch an act* ſuch a day, &c. *the condition is not performed* at the teſtator's death, nor at the day appointed, now the chattel is come back to the executor, and is aſſets in his hands. Went. Off. Ex. 76.

50. If an *executor ſtocks the land of the teſtator* (which comes to him as being a leaſe for years) *with his own ſheep* or cattle, this ſhall enure to his own benefit, for as he is to bear the loſs by rot or death, ſo he ought to reap the advantage; *but if the teſtator's ſtock be continued* upon the ground, the gain or loſs ſhall redound to the teſtator's eſtate; the like law if an executor finding that he cannot inſtantly after the teſtator's death let the leaſe at or near the value, ſhall therefore buy ſeed-corn, and hire the plowing, &c. But if a long leaſe worth 100l. per ann. come to executors, and no ſale is made thereof by the ſpace of a year or more (the term continuing of the ſame value as at firſt), the 100l. raiſed in one year ſhall be aſſets, &c. Went. Off. Ex. 83, 84.

51. If *A. covenants with B. to make a leaſe to him* of ſuch and ſuch land by ſuch a day, and *B. died before the day, and before any leaſe made* A. muſt make the leaſe to B.'s executor, and this ſhall be

be assets in his hands. Went. Off. Ex. 81. cites the case of Chapman and Dalton in Queen Elizabeth's time.

*53. If a *bishop hath a ward fallen and dies*, neither the king nor the successor, but the executor, shall have the ward, and the ward shall be assets; so it is of an *heriot*, *relief*, &c. Co. Litt. 388. a.

54. If an *executor dies indebted*, *leaving goods of a great value of his testator's*, these goods are not assets in the hands of the executor's executor for payment of the *debts of executor*, but only for payment of the first testator's debts or legacies. Went. Off. Ex. 86.

55. If any *defeasible estate* of the testator's comes to the possession of the executor, and afterwards is *evicted*, the loss shall not fall upon the executor. Went. Off. Ex. 113, 114.

56. If testator the time of his death had a *ship at sea* in which he had much goods and merchandizes, which are *cast away* and lost before arrival, the executor is not liable. Went. Off. Ex. 114.

57. *So* of a stock of *sheep* left by testator, and being tainted *with the rot*, *and dying* soon after, the executor is not liable. Went. Off. Ex. 114.

58. *Remainder for years in testator* in such manner that he might dispose of it at his pleasure, *though it fall not into possession in his life-time*, is doubtless assets to the executor, even whilst it continues a remainder; because it is presently valuable and vendible. Went. Off. Ex. 82, 83.

59. If A. *assume* upon good consideration *to deliver to B.* 20 *quarters of malt by 1st of May*, or so many load of coals or wood, &c. and it is not performed in the life of B. but after to his executor, it shall be to him as executor, and shall be assets in his hands as well as the money recovered in damages for non performance should have been. Went. Off. Ex. 82.

60. If *A. makes B. executor*, and *B. makes C. executor*; the *goods of A. in the hands of C.* are not liable to a judgment had against B. Nor the *goods of B.* in the hands of C. subject to a judgment against A. Went. Off. Ex. 137.

61. If A. be *bound to B.* by bond, statute, or recognizance, *for assurance of land*, *and B. dieth*, and the land descends to the heir; or be it that B. sold the land to C. and assigned to him the bond, statute, &c. the author thinks that the *extent* must be sued out in the name of the executor of B. and *that which is recovered* will be *assets* in law *to charge the executor*; *yet* in equity it *pertains to the heir* or assignee. *Quære*, If the executor meddle not, but only suffer his name to be used. Went. Off. Ex. 75.

Nelf. Chan. Rep. 44. S. C.—— Plowd. Com. 186.

62. A *debt due from an executor to a testator* is assets in equity to pay legacies. 3 Chan. Rep. 89. 21 May 1646. Nichols v. Chamberlain.

In case of Woodward v. Darcy, cites 8 E. 4. 3. F. tit. Executors, 32. Br. 112.

62. In debt against the defendant as executor of T. F. who hath by his will *devised trees to be sold*, *and also* devised *other land*

*to*

*to be leased for payment of his debts*, and at this time the *devisor was joint-tenant with another whom he had trusted* and then dies, the defendant sells the things so devised, and it was ruled this shall be assets in law, and the jury found accordingly for the plaintiff. Clayt. 123, 124. pl. 119. March 1647. Topham v. Brown.

63. A. bequeathed 500 *l.* to B. and made C. executor and died. C. sold lands of his to D. *and left* 500 *l. of the purchase money* in D.'s hands. D. gave bond to C. in C.'s own name for it; C. made his will, and D. and E. executors, and died. D. and E. inventoried the 500 l. as part of C.'s estate; afterwards B. obtained a decree against the plaintiff for 500 l. on this equity, that that 500 l. was left in D.'s hands with intent and upon *trust* that he should pay it to B. the * Court declaring that it was not assets of C.'s estate. 3 Ch. Rep. 2. Pasch. 13 Car. 2. Jones v. Bradshaw.

S. C. cited 2 Vern. 57. in case of Baden v. E. of Pembroke. —— Nelson. Chan. Rep. 74. S. C. decreed. —— 2 Freem. Rep. 153. pl. 199. Pasch. 1661. S. C. decreed accordingly. And Sir John Maynard said, that if one sells land and leaves 500 l. of the purchase money in the purchasor's hands, and then gives or appoints this money to be paid to a stranger, and after makes his will, this stranger shall have the money, and it shall not be assets.

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65. *Lands were purchased to A.* but *conveyed to A. and B.* but B. to take nothing. A. dies; B. is decreed to convey to the heirs of A. These lands being trust lands are no assets in equity, though the *trust* be decreed in equity. Chan. Cases, 12. Trin. 14 Car. 2. Bennet and Brownlow v. Box & al'.

2 Freem. Rep. 184. pl. 259. S. C. says, that the ancestor's incumbrances on the lands were so great that the revenue would not pay the interest, for which reason resolved to be no assets in equity. —— S. C. cited by Ld. Keeper. Chan. Cases, 128. Pasch. 21 Car. 2. in case of Prat v. Colt, where it was held that a trust of lands was no assets. —— 2 Freem. Rep. 139. pl. 177. S. C.

66. *Delivering up a bond and taking a new* bond to the executor himself, with additional surety, is no conversion in *equity* to charge the executor with the payment of that money. Chan. Cases, 74. Pasch. 18 Car. 2. Armitage v. Metcalf.

But at law it is a receipt and conversion of so much of the estate. Ibid.

67. If *cestuy que trust* binds himself and his heirs in a *bond*, this *trust* is not assets to the *heir*, though questioned in Ld. Chancellor Hide's time, but clearly the *trust of a lease for years* is assets to charge an executor in equity. 3 Chan. Rep. 37. Pasch. 21 Car. 2. in Scacc. in case of the Attorney General v. Sands.

Nelson. Chan. Rep. 134. S. C. —— 2 Freem. Rep. 131. pl. 157. S. C. in totidem verbis. —— But by 29 Car. 2. cap. 3. the trust of an inheritance is made assets at law, but the trust of a term is not, and by a clause where judgment is obtained against the testator, the sheriff may take the trust estate in execution. 2 Vern. 240. pl. 232. Mich. 1691. The King v. Ballet.

Land purchased in trust was decreed to be assets to pay judgments. 2 Chan. Rep. 143. 30 Car. 2. Grey v. Colvill.

Whether the trust of an estate in fee descended on the heir is assets in equity to the satisfaction of a debt by bond in which the heir is bound, dubitatur. Vern. 172. pl. 167. Trin. 35 Car. 2. Creed v. Coville.

68. *Feoffment* of a manor, excepting and *reserving Black Acre* to himself for life only, habend' except before excepted, to the use of A. in tail; resolved there is no limitation of use of Black Acre, so it results and descends, and is assets. 1 Lev. 287. Pasch. 22 Car. 2. B. R. Wilson v. Armorer.

Raym. 207. S. C. —— Vent. 78. S. C. adjornatur. —— And Ibid. 87. S. C. adjornatur, and Ibid. 106. S. C. adjudged that it descended. —— 3 Salk. 157. pl. 2. S. C. adjudged accordingly.

69. An eſtate in fee in the plantations is a teſtamentary thing, and aſſets to pay debts. 2 Vent. 358. Trin. 22 Car. 2. Noel v. Robinſon.

70. A *ſum of money given to one to diſpoſe as the teſtator ſhall appoint by a note, who dies without ſuch appointment*, is a good bequeſt to the party. Chan. Caſes, 198. Paſch. 23 Car. 2. in caſe of Martin v. Douch.

Note, That where a mortgagor in fee was bound in a bond and died, and the heir ſold the equity of redemption, it was held, 1ſt, That the equity of redemption ſince the ſtatute of frauds and perjuries was aſſets to a bond creditor; and 2dly, That notwithſtanding the alienation, yet the value ſhould be aſſets in the hands of the heir. 2 Freem. Rep. 115. pl. 130. Hill. 1690. Anon. Ex relatione Sir Fra. Winnington, who was counſel in the cauſe.

71. On a *bill* in Canc. to be relieved *againſt the heir of the mortgagor for money received after his father's death for a releaſe of equity of redemption*; Finch Ld. Keeper conceived this is no aſſets in law, to ſatisfy a judgment acknowledged by the mortgagor after the mortgage and before the releaſe, being but a bare right, and being not aſſets in law, the releaſe being before the bill exhibited is no fraud, * and ſo not aſſets in equity; decreed for the defendant ut dicitur, verdict for the plaintiff. 3 Keb. 307. pl. 49. Paſch. 26 Car. 2. B. R. Freeman v. Taylor.

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Neſ. Chan. Rep. 44. S. C.—— Pl. Com. 186. in caſe of Woodward v. Darcy, cites 8 E. 4. 3. F. tit. Executors, 32. Br. 112.

72. A *debt due from an executor to a teſtator* is aſſets in equity to pay legacies. 3 Chan. Rep. 89. 21 May, 1646. Nichols v. Chamberlain.

73. *Leaſes* are aſſets to pay debts, notwithſtanding the *aſſent of the executor* to the deviſe of them. Chan. Caſes, 157. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

Goods of other men in the hands of the executor ſhall not be aſſets.

74. *Goods returned for an advantage* of a ſtranger by inteſtate, ſhall not be accounted any part of the inteſtate's eſtate. 2 Chan. Caſes, 233. Mich. 29 Car. 2. Turney v. Dowes and Moyor.

R. S. L. 127. cites Went. Off. Ex. cap. 6.

2 Jo. 88. S. C.—— 3 Keb. 397, Acc. S. C. —6 Mod. 94. cites S. C. and ſays, this judgment was affirmed in Dom. Proc.

75. A. takes the goods of a teſtator, B. the *executor brings trover*, upon which A. and B. come to an *agreement that executor ſhall diſcharge A. and that A. ſhall pay executor* 650*l.* *at a future day*; per Cur. this is not a devaſtavit, but afterwards per Sir T. Jones J. it is a *diſpoſal* or ſale and converſion to his own uſe, by the acceptance of a *new ſecurity*, by which he has diſcharged the ancient right to the goods, and ſo it is quaſi a *ſale* of them, and aſſets immediately, though by his act the money is not payable till a future day, and all the juſtices at another day agreed that it was a diſpoſition, and judgment accordingly was given pro quer' per tot. Cur. 2 Lev. 189. Paſch. 29 Car. 2. Norden v. Levet.

The deſign of the ſtatute was only in reſpect to creditors, to make an eſtate pur

76. 29 *Car.* 2. *cap.* 3. *ſ.* 12. *An eſtate pur auter vie ſhall be deviſable by a will, ſigned and ſubſcribed as by the ſaid act is directed; and if no ſuch deviſe be, it ſhall be chargeable in the hands of the heir, if it come to him by ſpecial occupancy as aſſets by deſcent, elſe it ſhall go to the executors, and be aſſets in their hands.*

auter vie aſſets for payment of debts, and for that end only the adminiſtrator is made an occupant, but in

In all other reſpects the quality of the eſtate remains the ſame as it was before at common law. Carth. 376. Paſch. 8 W. 3. B. R. Oldham v. Pickering. ——That if it came to the heirs by reaſon of ſpecial occupancy, it ſhall be in his hands as aſſets by deſcent, that is liable to thoſe debts where the heir is chargeable and thoſe only; but if there was no ſpecial occupant then it ſhall go to the executors and adminiſtrators, and they ſhall be in the room of the occupant, and it ſhall be as aſſets in their hands for the payment of debts; but it is not aſſets to pay legacies except ſuch as are particularly deviſed out of it, the ſtatute only having made it aſſets for a particular intent to pay creditors, ſo as no debts appearing in this caſe, the adminiſtrator is as it were the occupant, and ſhall not be compelled to make diſtribution. 12 Mod. 103. Mich. 8 W. 3. Oldham v. Pickering. ——2 Salk. 464. S. C. adjudged accordingly.

77. *Money due on a mortgage* is part of the perſonal eſtate, and ſhall go in eaſe of the lands to pay debts. Fin. R. 351. Paſch. 30 Car. 2. Corſellis v. Corſellis.

78. A. owes B. 200l. and C. owes A. 60l. *A. makes his wife executrix, who marries C.* Afterwards C. dies. B. brings debt againſt the wife. Per Curiam the inter-marriage of the wife with the debtor of the teſtator is no devaſtavit of the 60l. nor is the 60l. aſſets in her hands. Le. 320. pl. 448. Mich. 30 & 31 Eliz. B. R. Croſman v. Read. Mo. 236. pl. 368. S. C. accordingly.—— Cro. E. 114. pl. 12. S. C. accordingly.

79. *Reverſionary lands purchaſed in the names of A. and B.* after the death of C. who has eſtate for life in the ſaid lands, was decreed to go towards ſatisfaction of judgments. 2 Chan. Rep. 145, 146. 10 Car. 2. Grey v. Colvill.

80. *A promiſe by the executors to the teſtator to pay all the legacies in caſe he would not alter his will,* ſhall bind, though he does not receive out of the teſtator's eſtate or effects ſufficient to pay ſuch legacies. 2 Freem. Rep. 34. Paſch. 1678. Chamberlaine v. Chamberlaine. [ 235 ]

81. *Cargo of goods ſent into France* amounting to 500l. to have returns, are to be charged as part of the perſonal eſtate, though defendants pretend a gift of them from the teſtator in his life-time. Fin. Rep. 416. Hill. 31 Car. 2. Stubbs v. Stubbs. Ibid. 370. Trin. 30 Car. 2. Gundry v. Gundry. S. P.

82. M. poſſeſſed of a long term of years having iſſue a ſon and three daughters, makes his will, and *deviſes* his *chattel leaſes to his ſon, and if that ſon die before marriage or after marriage without iſſue,* that *then* they ſhould go *to the daughters.* The *ſon marries and dies without iſſue,* the daughters his executrixes, againſt whom an action of debt is brought upon a bond, plead no aſſets; and upon a ſpecial verdict, the queſtion being, whether this were *aſſets* in their hands, it was adjudged it was. Sel. Chan. Caſes, 18. cited by Lord Ch. B. Montague, as Hill. 31 and 32 Car. 2. Rot. 1615. Gibſon v. Sanders.

83. Where a *leaſe for years* is *to wait on the inheritance,* it ſhall be aſſets as to debts as well *where the intereſt of the leaſe is in the hands of a ſtranger, and not in the owner of the inheritance,* as when it is in the ceſtuy que truſt of the inheritance and the intereſt of the inheritance in a ſtrange truſtee, per Lord Keeper North. 2 Chan. Caſes, 152. Mich. 35 Car. 2. Ratcliff v. Graves.

84. Deed of *truſt for payment* of ſuch creditors *as come in within a year,* though ſome do not come in within the year, yet the remainder of the eſtate in the hands of the truſtees is ſpecial aſſets, Ibid. 319. Paſch. 1695. S. C.

and they may come in after; per North K. Vern. 260. Mich. 1684. Dunch v. Kent.

In ſuch caſe the heir aliened the real eſtate before a bill brought. The queſtion was, if the obligee was relievable here againſt the heir and purchaſor on the ſtatute to prevent fraudulent deviſes, or if he was to be ſent to law to get judgment firſt. Per Lord Wright, that ſtatute being introductive of a new law, the relief on it muſt be at law, and that a bond-creditor muſt firſt have judgment at law, before he can redeem a mortgage for years; though it might be otherwiſe in caſe of a mortgage in fee. Chan. Prec. 198. pl. 159. Trin. 1702. Bateman v. Bateman. —— Note, Chancery at this day gives relief upon the ſtatute of fraudulent deviſes in ſuch caſe. Ibid. Added as a note of the reporter. —— The very equity of redemption of a mortgaged term is aſſets, to pay ſimple contract debts. Per Lord Macclesfield. Wms.'s Rep. 775. Hill. 1721. in caſe of Coleman v. Winch.

85. Upon a queſtion if the *equity of redemption of a mortgage for years of an eſtate in fee* be aſſets? Lord Chancellor's preſent opinion was, if there was a ſurplus beyond the mortgages, it ſhould be aſſets to anſwer *bond-debts*. Vern. 410. pl. 384. Mich. 1686. Cole v. Warden.

Chanc. Caſes, 148. Mich. 21 Car. 2. Trevor v. Perrier, S. P. but no decree. —— The equity of redemption of an inheritance is not at law, becauſe the eſtate is forfeited, but the heir having a right in equity, that ought in equity to be liable to ſatisfy a bond-debt, and if the heir has aliened or releaſed his equity of redemption to prevent the creditors of the ſatisfaction of their debts, the Court will follow the money in the hands of the heir or executor. 2 Vern. 61. pl. 54. Paſch. 1688. Sawley v. Gower.

86. If the equity of redemption of a *mortgage in fee*, ſince the ſtatute of frauds and perjuries, ſhould be aſſets in equity to ſatisfy *bond-debts?* Lord Chancellor inclined that it was; but reſpited his decree till the Maſter had reported a ſtate of the caſe. Vern. 411. pl. 385. Mich. 1686. Plucknett v. Kirk.

87. Where a man, that is *executor in right of his wife*, compounds any of the debts of the teſtator, he cannot have the benefit of theſe *compoſitions*. Per North K. Vern. 261. Mich. 1687. Dunch v. Kent.

[ 236 ] 88. If a debt be due to the inteſtate, and the *adminiſtrator takes a ſecurity in his own name*, although *the firſt ſecurity* be *not delivered up*, yet in caſe the debt be not paid, this will be reckoned as aſſets come to his own hands, and will make a devaſtavit. The Court ſeemed to be of this opinion. 2 Freem. Rep. 100. in pl. 100. Mich. 1687. Anon.

89. An executor bringing *trover for goods* of the teſtator, *upon an agreement the executor took a bond for the value of the goods*; afterwards the *obligor became inſolvent*, and this was adjudged a devaſtavit; cited as adjudged in the Houſe of Lords. 2 Freem. Rep. 100. in pl. 100. Mich. 1687. Anon.

90. If *baron has a term in right of his wife* as executrix, and he *purchaſes the reverſion*, the term is extinct as to the feme, ſhe ſurvives, but in reſpect of all ſtrangers ſhe ſhall account as aſſets in her hands. Mo. 54. pl. 157. Paſch. 5 Eliz. Anon.

91. *A. on his marriage demiſes lands to B. who re-demiſes them to A. for a leſſer term, paying a pepper corn rent during the life of A. and after his death an annual ſum for the life of his wife for her jointure, and a pepper corn for the remainder of the term.* A. dies indebted; the re-demiſed term ſhall not be aſſets to pay any debts but what affect the inheritance, the term re-demiſed being raiſed for a particular

ticular purpoſe. 2 Vern. 52. pl. Paſch. 1688. Baden & al' v. Pembroke & al'.

92. The *wife had goods or effects* of her former huſband; the ſecond huſband aſſigned them in truſt for ſuch uſes as he by deed or will ſhould appoint, and in default of ſuch appointment in truſt for himſelf, his executors, adminiſtrators, and aſſigns, and *afterwards deviſes them to his wife and children*, but took no notice of the power of appointing. This is but in nature of a legacy, and decreed to be aſſets. 2 Vern. 287. pl. 275. Paſch. 1690. Aſhfield v. Aſhfield.

93. *Tenant in tail ſuffers a recovery to let in a mortgage of 500 years, and then limits the land to the old uſes*, and makes his will, and *deviſes all his lands for the payment of his debts*. The Court thought that the equity of redemption of this mortgage ſhould be aſſets to ſatisfy creditors, or a ſubſequent grantee of an annuity. Note, the redemption was limited to him, his heirs, or aſſigns. Chan. Prec. 39. pl. 40. Hill. 1691. Foſſet v. Auſtin.

94. The judgment againſt an heir, who has a *reverſion in fee* deſcended to him, is only of aſſets *quando acciderint*; and the creditor cannot by bill in equity compel the heir to ſell the reverſion, but muſt expect till it falls. 2 Vern. 134. pl. 132. Hill. 1690. Fortrey v. Fortrey.

95. *Truſt of a term* is not made aſſets at law by the ſtatute of frauds and perjuries. 2 Vern. 248. pl. 233. Mich. 1691. King v. Ballet.

96. A houſe was ſettled by B. on A. for life, with ſeveral remainders over, and B. by will gives *all the goods*, furniture, and ornaments therein, *to ſuch perſons as the houſe was to go to after teſtator's death*. A. has only ſuch intereſt in the goods as ſhe has in the houſe, viz. the uſe of them for her life, and nobody ſhall have an abſolute property in them but who has an abſolute property in the houſe, and ſo not liable to the debts of A.'s huſband, who died indebted. Ch. Prec. 26. Trin. 1691. Offley v. Offley.

97. All *ſeparate debts mentioned in the inventory ſhall be counted as aſſets* in the executor's hands; for it is as much as to ſay they may be had for demanding, unleſs the demand or refuſal be proved. 1 Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelly's caſe. Comb. 342. S. C. accordingly.

98. *In Barbadoes all freeholds are ſubject to debts, and* are *eſteemed as chattels till the creditors are ſatisfied*, and then the lands deſcend to the heir; per Cur. obiter 4 Mod. 226. Mich. 5 W. & M. in B. R. [ 237 ]

99. A. on B. his ſon's *marriage ſettles a leaſe for years* on B. for life, the wife for life, and then to the iſſue of the marriage. B. covenants to renew the leaſe from time to time, and to aſſign it on the ſame truſt; the ſon B. *renews the leaſe in his own name*, but makes no aſſignment to the truſtees, and dies in debt, and without aſſets. Per Cur. the leaſe is bound by the marriage-agreement, and ſhall not be aſſets, nor liable to debts. 2 Vern. 298. pl. 278. Plowman v. Plowman.

100. Holt Ch. J. doubted whether an eſtate pur auter vie was *ſubject to payment of general legacies*, in caſe it came to the hands of an executor or occupant by force of the ſtatute of 29 Car. 2.

cap. 3. Carth. 376. Paſch. 8 W. 3. B. R. in caſe of Oldham v. Pickering.

Becauſe his executor will be entitled to ſue out adminiſtration, and ſo differs from a judgment where the action is brought by huſband and wife. Per Cur. 1 Salk. 117. S. C. —— Lord Raym. Rep. 308. S. C. accordingly.

101. *Damages recovered by the huſband of an executrix*, in an action brought by him alone upon a promiſe made to him by the debtor of the teſtator, are direct aſſets at law; per Rookby J. though Holt ſaid, it would amount to a devaſtavit pro tanto. See Carth. 462. Mich. 10 W. 3. B. R. Yard v. Ellard.

102. A man makes a *bond to A. in truſt for B.* A. dies, his executor receives the money; it ſhall not be aſſets. Per Cur. 12 Mod. 381. Paſch. 12 W. 3. Nicols v. Bride Bridge.

103. A. ſeiſed of a *reverſion in fee, expectant on an eſtate for life, deviſed it to A. and B.* to be ſold for payment of debts and legacies, and made *A. and B. executors.* The queſtion was, if the money raiſed by ſale ſhould be deemed *legal aſſets?* and conſequently the debts to be thereout paid in the firſt place, or only as *equitable aſſets*, and conſequently the debts and legacies to be paid in proportion, and pari paſſu. Decreed the debts to be firſt paid; the *deviſees being named executors*, the money becomes legal aſſets; but if to truſtees not made executors, it had been otherwiſe. 2 Vern. 405. Mich. 1700. Anon.

104. If *H. takes a bond for another in truſt, and dies*, this is not aſſets in the hands of the executor of H. 1 Salk. 79. pl. 1. Trin. 2 Ann. B. R. Deering v. Torrington.

105. So if the *obligee aſſigns over a bond*, and *covenants not to revoke*, and dies, that bond is not aſſets in the hands of the executor of the obligee. 1 Salk. 79. pl. 1. Trin. 2 Ann. B. R. Deering v. Torrington.

106. If *money due to the teſtator is paid to a ſtranger, by conſent of the executor, it* is aſſets in his hands immediately; and *if without ſuch conſent*, and *he after brings an action for it againſt the receiver* (by which he agrees to the receipt) *and recovers*, it will be aſſets immediately without execution, for the original debtor is thereby diſcharged; per Cur. 1 Salk. 207. Hill. 2 Ann. Jenkins v. Plume.

107. The Lord C. *upon his marriage* with Sir Stephen Fox's daughter, *veſted a term in truſtees* upon truſt *to raiſe* 3000*l. for younger children, and* 3000*l. more for ſuch uſes and purpoſes as he ſhould appoint. He appoints* 3000*l. to be raiſed for his daughter, and the other* 3000*l. he appointed to be raiſed, and by his will gave the laſt* 3000*l. to his daughter alſo, and died.* The creditors preferred a bill to have *the laſt* 3000*l. applied as aſſets towards payment of* their *debts*, which was the only queſtion in the caſe; and in this caſe it was decreed, that the laſt 3000*l.* ſhould be aſſets, for he having appointed it to be raiſed, it was in the nature of his perſonal eſtate, and the debts ſhould take place before the legacy given to his
[ 238 ] daughter; but in this caſe it was held, that if *a man who has power to raiſe money dies in debt, having made no appointment to raiſe it, the creditors cannot make this aſſets*, and raiſe the money purſuant to the power;

power; but in the caſe in queſtion, the money was appointed to be raiſed, which made the difference. 2 Freem. Rep. 279. pl. 350. Hill. 1704. The Ld. Cornwallis's caſe.

108. *Goods denied* by executor *to be ſold at a good price*, if they are afterwards *taken from him*, the value of the goods ſhall be aſſets in his hands, and not what he recovers in *damages*, becauſe there was default in him. 6 Mod. 181. Trin. 3 Ann. B. R. in caſe of Jenkins v. Plume.

109. *Money articled to be laid out in land* ſhall be taken as land in equity; ſo *land agreed to be ſold* is as money; but quære if it be in a marriage ſettlement upon failure of iſſue, and there is no iſſue, but there be debts by ſimple contract, whether this money ſhall be taken as land and thereby defeat creditors? 1 Salk. 154. Mich. 4 Ann. in Canc. Anon.

110. *Huſband lends out money in the names of himſelf and his wife, upon mortgages and bonds, and dies.* The wife is intitled to this by ſurvivorſhip, if there are aſſets ſufficient without this money to pay debts; but admitted *in caſe of creditors it might be fraudulent.* 2 Vern. 683, 684. Trin. 1712. Chriſt's Hoſpital v. Budgin & Ux'.

111. A. ſeiſed of a freehold eſtate to *him and his heirs* for the three lives of B., C., and D., *ſettles* it on his daughter and her huſband for their lives, *remainder to the uſe of his own executors and adminiſtrators.* The daughter and her huſband die. A. dies indebted by ſimple contract, and deviſed this eſtate to his wife. Per Cowper C. though the general words in the ſtatute 29 *Car.* 2. *cap.* 3. againſt fraudulent deviſes may extend to the *deviſe of an eſtate pur auter vie*, yet that is only for creditors by ſpecialty; but in this caſe the reſidue of the term being to A. and to his executors and adminiſtrators, he had made it *perſonal eſtate*, and he took it, that before the ſtatute, if eſtate pur auter vie came to an executor or adminiſtrator, it would have been *aſſets*, and decreed it accordingly. 2 Vern. 719. pl. 638. Mich. 1716. Duke of Devon v. Kinton.

The S. P. came again before the Court in Ld. C. King's time, when the deviſee in remainder, who was not made a party to the former ſuit, was now made a party; and it was objected, that if one ſeiſed in fee ſhould convey to the uſe of himſelf for life, remainder to his executors, that this would not make it perſonal aſſets, and that if the executors are ſpecial occupants, or take by occupancy, then it cannot be aſſets; but his Lordſhip ſaid that the caſes are different, that here the executors and adminiſtrators are made ſpecial occupants, and alſo take as executors, whereby the premiſes are perſonal eſtate as naturally as if originally limited to executors, and decreed it to be perſonal eſtate, and that it could not be deviſed away by the teſtator from his creditors. 2 Wms.'s Rep. 381. Mich. 1726. Duke of Devon v. Atkins.

112. One *binds himſelf and his heirs by a bond, and mortgages ſome lands, of which he is ſeiſed in fee, for more than the value*; his *heir has* 200*l. for joining in a ſale of the premiſes.* This 200l. was held not to be aſſets. 3 Wms.'s Rep. 10. pl. 2. Trin. 1724. Dunn v. Green.

113. A younger *brother beyond ſea purchaſed land in fee of his elder brother*, and *made his will, leaving ſeveral legacies*, and then added theſe words, (viz.) *Whatſoever ſhall remain in money, lands, and goods, I give the ſame to my brother J. C.* (his ſaid eldeſt brother), *who is thereout to pay my legacies, and made J. C. his executor* and reſiduary legatee; but the *will had but two witneſſes*, and was made beyond ſea. The teſtator died without iſſue, and *J. C. was his heir as well as exe-*

*cutor.* The *purchaſe-money was not all paid, beſides which there were not aſſets for payment of legacies.* Ld. Chancellor thought that J. C. the heir, being alſo executor, may retain out of the aſſets all the purchaſe-money unpaid, though intitled to the land again as heir, and cited the maxim *quando duo jura in una perſona concurrunt, &c.* [239] and ſaid, that taking it that they had been ſeveral, as if A. had been the heir, B. the executor, and C. the vendor, A. would have a plain title to the land purchaſed, and B. muſt, out of the perſonal aſſets, pay the purchaſe-money to C. who would have a plain title to receive it, and would make no difference from what it now is. 2 Wms.'s Rep. 291, 292. 295, 296. Trin. 1725. Coppin v. Coppin.

114. *Huſband after marriage purchaſes a term to himſelf and wife and the ſurvivor, and the executors, adminiſtrators, and aſſigns of ſuch ſurvivor. Huſband aſſigns the term in mortgage, proviſo to be void on payment of the money by him or wife, or the executors of him or wife. Proviſo that the huſband, his executors or adminiſtrators, ſhall, till default of payment, quietly enjoy. Huſband ſeven years after contracts debts and dies.* Decreed that this ſettlement of the term being after marriage in the power of the huſband, and the equity of redemption being reſerved to him as well as to his wife, and being alſo in the caſe of creditors, were aſſets to pay debts. 2 Wms.'s Rep. 364. Trin. 1726. Watts v. Thomas.

115. The Maſter of the Rolls decreed an account to be taken of a perſonal eſtate, doubting at the ſame time, whether a *leaſehold eſtate in Scotland* could be looked upon as a perſonal eſtate in England; though a leaſehold eſtate *in Ireland* is, and may be ſold here; but the Maſter was left at liberty to report any thing ſpecially. 2 Wms.'s Rep. (622). Trin. 1731. Bligh v. Ld. Darnley.

116. A *leaſe* granted *to one and his heirs for three lives* is a real eſtate, and though by the ſtatute of frauds it is made *liable* to pay debts, yet it is *only to ſuch debts as bind the heir*, and where the ſpiritual court ſets aſide a will diſpoſing (inter alia) of ſuch eſtate as revoked, this ſentence did not affect the deviſe of ſuch real eſtate. 3 Wms.'s Rep. 166. pl. 40. Hill. 1732. Marwood v. Turner.

117. When *money by a marriage agreement is articled to be inveſted in land*, that money is held not to be aſſets for payment of debts. 3 Wms.'s Rep. 217. Mich. 1733. cited in the caſe of Kettleby v. Atwood, as the caſe of Lawrence v. Beverley.

118. Where the *huſband agreed that the wife ſhould have two guineas of every tenant that renewed a leaſe* with the huſband *beyond the fine which the huſband received*, this was allowed to be the wife's ſeparate money. 3 Wms.'s Rep. 339. Mich. 1734. cited per Cur. as the caſe of Calmady v. Calmady.

119. An *advowſon deſcending to an heir* is real aſſets, and (as it ſeems) extendable in an elegit. 3 Wms.'s Rep. 401. Mich. 1735. Robinſon v. Tonge.

## (G. a. 2) What ſhall be Aſſets.

### At what Time.

1. *BONDS* and ſpecialties are no aſſets till the money is paid. Vent. 96. Trin. 22 Car. 2. B. R. in the caſe of Noel v. Nelſon. Owen, 56. Mich. 15 Eliz. Anon. S. P.—— 2 Vern. Arg. 299. S. P.

2. If a *treſpaſſor takes goods from a teſtator* in his life-time, ſo as they never were but a choſe en action to the executor or adminiſtrator, they are *not aſſets till* they are *recovered*. Per Cur. Cro. E. 810. pl. 16. Hill. 43 Eliz. C. B. [ 240 ]

3. A *right* (without any eſtate in poſſeſſion, reverſion, or remainder) *for which good remedy lies* by action, is not aſſets till it be recovered and reduced into poſſeſſion. 6 Rep. 58. a. b. Hill. 4 Jac. C. B. in Brediman's caſe.

4. *Lands deviſed to executors for three years for payment of debts*, this is aſſets in the executor's hands; but if I deviſe my land to be ſold for payment of my debts, it is no aſſets before it is ſold. 2 Brownl. 46, 47. Hill. 8 Jac. C. B. Brownl. 34. S. C.—— But when ſold, the money is aſſets at common law. Per Twiſden J. Lev. 224. Dethick v. Caravan, alias Curwin.——Le. 225. Arg. S. P. in caſe of Alexander v. Lady Greſham, cites D. 264.

5. All *moveable goods*, though in ever ſo many different and *diſtant places* from the executor, ſhall be in poſſeſſion of the executor preſently upon teſtator's death; yet if without fraud or colluſion, or voluntary conniving, he is *prevented of actual poſſeſſion*, he is not to be liable in reſpect thereof to creditors. Went. Off. Ex. 107, 108, 109.

6. *But* otherwiſe it is of *things immoveable*, as *leaſes for years* of land, in which caſe there muſt be actual entry; ſo of leaſes of a *rectory conſiſting of glebe* land and tithes for years, it may be a doubt if actual poſſeſſion can be without actual entry into the glebe land; but in caſe of leaſes for years of *tithes only* the executor, though in never ſo remote a place, ſhall inſtantly, upon the ſetting out thereof, be in actual poſſeſſion to maintain action of treſpaſs for taking them away. Went. Off. Ex. 107, 108.

7. If the executor be of ſecret *aſſent to an embezzlement of goods after death of teſtator*, whereof even *forbearing to ſue for recovery of them*, or the value of them in damages if known where they or the embezzlers of them are, is a ſhrewd *evidence* or proof, in ſuch caſe the executor ſhall be adjudged an haver of them, and ſo ſtand charged as having them; for *pro poſſeſſore habetur qui dolo deſiit poſſidere*. Went. Off. Ex. 111.

8. In caſes of *account*, where the duty was *choſe en action* veſted in teſtator, and aſcertained only by auditors, nothing ſhall be aſſets till the executor has recovered the duty and has it in his hands;

hands; but a *reverſion of a term* which teſtator granted for part of the term, is in the executor immediately by death of teſtator, and alſo aſſets in his hands immediately for the entire value of it. 2 Jo. 170. Mich. 33 Car. 2. B. R. Trattle v. King.

9. If an *executor brings an action and recovers judgment*, the money recovered is not aſſets till *levied by execution*. Per Cur. 1 Salk. 207. in pl. 6. Hill. 2 Ann. B. R.

[241] (G. a. 3) Aſſets. What.

## Things which never were in the Teſtator or Executors.

1. IF executor *merchandizes with teſtator's goods*, and makes gain thereof, it is aſſets. Went. Off. Ex. 83.

2. *Lambs, calves, colts, &c. bred after teſtator's death*, of the teſtator's cattle, are aſſets. Went. Off. Ex. 83.

3. *So wool* growing on the ſheep after teſtator's death. Went. Off. Ex. 83.

4. If the executor *ſubmits to arbitration*, the debts or damages which he is intitled to in right of his teſtator, and the arbitrators award a releaſe or diſcharge thereof, this being his own voluntary act, ſhall charge him in the ſame manner as if he had releaſed or received the money. Went. Off. Ex. 71.

Lev. 306. Horſey v. Turges, S. C. adjudged.— 2 Keb. 741. pl. 42. S.C. and by Twiſden clearly that the debt is not attachable, becauſe the adminiſtrator de bonis non of the teſtator can never recover the debt, and the caſes of aſſets is not like this; for this ſhall not be aſſets until the executor receives it, and judgment for the plaintiff niſi.

5. If the plaintiff (as executor) and the defendant *ſubmit all controverſies relating to the teſtator's eſtate to arbitration*, and arbitrators award that the defendant ſhould pay the executor 300l. and there is a cuſtom of foreign attachments in London, that if a ſuit be commenced againſt the executors of any perſon, any debt which was due to the teſtator, tempore mortis ſuæ, might be attached; yet this 300l. although it be aſſets, and ſhall charge the executor, ſhall not be within the cuſtom; for it was not the teſtator's at the time of his death, and all cuſtoms are to be conſtrued ſtrictly. Vent. 111. Hill. 22 & 23 Car. 2. B. R. Houſam v. Turget.

## (G. a. 4) Aſſets.

## Pleading Perſonal Aſſets.

1. IN debt againſt executor the jury found aſſets in Ireland; per tot. Cur. præter Walmſley, aſſets *in Ireland* are aſſets here, and ſuch aſſets may well be *found by jury*, though their ſaying (in Ireland) is idle and void; and adjudged for the plaintiff againſt the executor. Cro. J. 55. pl. 28. Mich. 2 Jac. C. B. Richardſon v. Dowell.

2. It

2. It ſhall not be *intended* that an executor has *ſpecial aſſets*, (as money received for lands deviſed to be ſold for payment of debts, or damages recovered in treſpaſs for goods taken away in the life of the teſtator, &c.) unleſs it be ſpecially ſhewn. Cro. J. 152. pl. 4. Mich. 4 Jac. B. R. Gewen v. Roll and Noble.

3. Executor was ſued in the ſpiritual court to account for goods of teſtator's omitted in the inventory, and which were *in teſtator's poſſeſſion at his death.* The executor pleaded that the ſaid *goods were diſpoſed by the teſtator in his life*, and by his leave. On this plea the ſpiritual court gave coſts, for that it was a confeſſion of more aſſets than were in the inventory. 8 Mod. 168. Trin. 9 Geo. [ 242 ] Hinton v. Parker.

4. In *ſci. fa. on a judgment in debt* to have execution, the *defendant's executor pleaded that he had not aſſets over and above what would ſatisfy the former judgments pleaded*, and held a good plea; but if he pleads any of the judgments ill, or that it be found againſt him upon iſſue tried, that any of them is kept on foot by fraud, he ſhall not then have the allowance of being free of ſuch a judgment till aſſets deſcend to the value of the other judgments. Cited by Holt Ch. J. 12 Mod. 528. as Paſch. 23 Car. Rot. 339. Walpole v. Prettiman.

5. If a *bond* due to a ſtranger be forfeited, and the executor pleads this bond, and that he has not aſſets ultra, it is a good replication to ſay that the *obligee would have taken part of his money in full*, and it ſhall be a bar for no more. Vent. 354. Paſch. 33 Car. 2. B. R. in caſe of Page v. Denton.

6. If an executor hath *three or four bonds in ſuit againſt him*, and they all *come to trial at once*, being for 28l. a-piece, and the executor has *aſſets only to pay one*, yet he ſhall be chargeable to them all, therefore he ſhould have confeſſed judgment to one of them, and that he might have pleaded to the other. 2 Show. 202. pl. 207. Paſch. 34 Car. 2. B. R. Anon. Ibid. 503. Mich. 2 Jac. 2. B. R. Arg. S. P.

## (G. a. 5) Suits in Equity as to Aſſets.

1. WHETHER a *copyhold deviſed to be ſold by executors to pay debts*, and ſold accordingly by aſſets in law and in equity, or at law only. Hard. 174. Mich. 12 Car. 2. in the Exchequer. Fanſhaw v. ....

2. Upon a bill in equity the Court held clearly, that if *land* were *deviſed to be ſold by executors for payment of the teſtator's debts*, the *money received by ſuch ſale ſhould be aſſets* in the executors hands, if an action of debt were brought againſt them, and the plaintiffs would have been diſmiſſed if all the land had been ſold; but becauſe they did not appear, the bill was retained. And afterwards by agreement the parties went to law, upon the defendant's confeſſing that he had received 2800l. for land ſold. Hardr. 405. pl. 8. Paſch. 17 Car. 2. in Scacc. Burwell v. Corrant.

3. The ſuit is to recover the eſtate of R. A. deceaſed, which is come to the defendant's hands to ſatisfy a debt of 300l. due to the

the plaintiff from the ſaid R. A. The defendant inſiſted that the plaintiff ought to have relief in this court, in regard the aſſets in the defendant's hands were legal aſſets, and nothing appeared, but that the plaintiff had her proper remedy at law, having not proved any thing more in the defendant's hands than was confeſſed in the defendant's anſwer. But the plaintiff inſiſted that this Court hath *directed accounts in caſes of this nature, to avoid circuity of action, and further charge* and *trouble of ſuits*; and that this Court being poſſeſſed of the cauſe, and the parties at iſſue on proofs, the ſame was as proper for this Court as at common law. This Court ordered precedents to be ſearched, where this Court hath directed accounts, and given relief in this caſe, and the cauſe coming to be heard on the precedents and merits thereof; and the plaintiff inſiſted, that there is ſufficient aſſets of the ſaid R. A. come to the defendant's hands, to ſatisfy the plaintiff's debt with
[ 243 ] the overplus. This Court decreed the defendant to come to an account for the eſtate of one B. unadminiſtered. 2 Chan. Rep. 37, 38. 21 Car. 2. Alexander v. Alexander.

4. *Equity of redemption* of leaſes mortgaged made aſſets to ſatisfy a judgment creditor, and a *voluntary deed of truſt* ſet aſide, and decreed that all the truſt eſtate and ſurplus thereof, after preceding debts paid, be aſſets in equity for payment of the plaintiff. 2 Chan. Rep. 62. 23 Car. 2. Barthrop v. Weſt.

It is part of the perſonal eſtate, and ſhall be applied for payment of debts in caſe of the real.

5. *Money due on a mortgage* decreed to be aſſets in equity for payment of a debt by ſimple contract, but the perſonal eſtate to be firſt liable, and then the principal and intereſt due on the mortgage (after real incumbrances taken off) ſhall be liable to make it good. Fin. Rep. 236. Mich. 27 Car. 2. Bridgman v. Tyrer. Fin. Rep. 351. Paſch. 30 Car. 2. Corſellis v. Corſellis.

6. *Leſſee for years ſubject to a truſt deviſeth reſid' bonorum. The eſtate would but pay the debts, if all ſold.* He *pays the debts, and renewеth the leaſe term for a further term*, it being a church leaſe, and *offered to account if any profits would ariſe out of the old term*; and argued that he could not be charged farther, for if he paid the debts to the value, then the property was altered and veſted in him in his own right. But decreed, that the executor ſhould make no advantage to himſelf, and ſhould account for the new leaſe as well as the old. Ld. Keeper aſked, if the executor acquainted the church with this caſe, and did declare, that he would renew and take it for the time of old term to the benefit of the creditors and executorſhip, and the reſt for himſelf. 2 Chan. Caſes, 207, 208. Mich. 27 Car. 2. Anon.

But where the inheritance is in the purchaſor, and the term in truſtees, it is otherwiſe, if they are diſpoſed by will made

7. Finch Chancellor ſaid, he would not make a *leaſe for years attending the inheritance*, to be aſſets in equity, where it is not ſo at law; and where ſuch a leaſe is in the purchaſor, and the inheritance in truſtees, and the purchaſor dies indebted, ſo that the term in law will come to the executor, and be aſſets to creditors, he would not make it not to be aſſets in equity. 2 Chan. Caſes, 49. Hill. 32 & 33 Car. 2. Tiffin v. Tiffin.

without thoſe circumſtances which the ſtatute againſt frauds and perjuries requires in caſe of

of deviſes of inheritance. 2 Chan. Caſes, 55. Trin. 33 Car. 2. S. C. ——Vern. 1. S. C. The term in the laſt caſe ſhall attend the inheritance. ——2 Freem. Rep. 66. pl. 77. S. C. held accordingly.

8. As to an *equity of redemption*, if A. has a *mortgage and a bond*, North K. ſaid, that before the mortgage ſhould be redeemed by the heir, the bond ought to be ſatisfied; but he did not know that an equity of redemption ſhould be aſſets in equity to all creditors. Vern. Rep. 174. Trin. 35 Car. 2. 1683. Creed v. Covile.

9. A *purchaſor takes a term in a truſtee's name, and the inheritance in his own;* this term, *unleſs declared to attend the inheritance, will be aſſets in equity.* If he takes the inheritance in a truſtee's name, and a term in his own, it will be aſſets at law. Vern. 188. in pl. 188. Mich. 1683. in caſe of Chapman v. Bond.

10. A. and B. were bound to C. for the debt of A.—A. by way [ 244 ] of indemnification *aſſigned to B. a term for years*, and dies, and *makes B. executor*. B. applies the *perſonal aſſets* to diſcharge the debt for which he was bound, ſo that there was no perſonal aſſets left to pay a *creditor by ſimple contract*, who prayed to have the benefit of the ſecurity to B. but non allocatur; for it was in the power of the executor to *apply* the perſonal aſſets the one way or the other. 2 Vern. 36. pl. 29. Hill. 1688. Sprignel v. Delawne.

10. A. had a *leaſe for three lives to him and his heirs* from the church, and *mortgaged it for 99 years, if the three lives* lived ſo long, and died, the mortgage being forfeited; decreed this mortgage term, which would not have been aſſets at law, to be ſold for the payment of debts. 2 Vern. 54. pl. 50. Paſch. 1688. Arg. cites it as decreed in Ld. Nottingham's time in Took's caſe.

11. If one ſeiſed in *fee mortgages for 99 years*, the *equity of redemption* has always in this court been adjudged aſſets. Arg. 2 Vern. 55. Paſch. 1688. in caſe of Baden v. the Earl of Pembroke.

An equity of redemption is every day made aſſets in equity. Arg. Vern. 173.

12. A. on ſale of lands takes a *bond* from the purchaſor *to pay* any ſum or ſums of money, not exceeding 500l. *as A. ſhould by will appoint*. Per Cur. A. having *power to diſpoſe* the 500l. muſt be looked on as part of his eſtate, and decreed it to be aſſets liable to the plaintiff's debt. 2 Vern. Rep. 319. pl. 306. Trin. 1694. Thomſon v. Towne.

Chan. Prec. 52. S. C. Paſch. 1695. that A. was indebted to B. in 300l. and B. being his near kinſman A. ſettled his eſtate of about 150l. a year on himſelf for life, the reverſion to B. and his heirs, and B. as a conſideration of ſuch ſettlement gave a bond to J. S. the defendant by direction of A. to pay 500l. to ſuch perſon or perſons as A. by will ſhould appoint. A. by will reciting the bond to be in truſt for him gives the 500l. to the ſaid J. S. and makes him executor, and directs him to pay 50l. to D. to bind him apprentice, and 50l. more to ſet him up, and 20l. a year to E. for life. J. S. ſues the bond. B. brought his bill to ſubject this 500l. to be aſſets to pay the 300l. and 70l. more due to him from A. Ld. Keeper decreed the 500l. to be aſſets to pay B.'s debt, and he to retain ſo much to ſatisfy himſelf, and pay J. S. the reſidue, and on appeal to the Houſe of Lords, this decree was confirmed. ——S. C. cited by Ld. Keeper, as decreed and affirmed accordingly. 2 Vern. 466. Mich. 1704. in pl. 425.

13. A. having a *power to charge* 3000l. *on his eſtate for ſuch purpoſes as he ſhould think fit*, by deed appoints the 3000l. as a collateral

Chan. Prec. 232. pl. 193. S. C. becauſe he

collateral ſecurity for quiet enjoyment of an eſtate he had ſold, but the appointment to be void if no incumbrance appears. A. *deviſed it to his daughter;* the creditors of A. brought a bill to have the 3000l. applied to payment of debts, and decreed accordingly. Per Wright K. 2 Vern. Rep. 465. pl. 425. Mich. 1704. Laſſels v. Cornwallis.

had a reſulting equity in it, which he might deviſe, but not to take place of creditors, and he had before made an appointment which ſatisfied his power, by appointing it a collateral ſecurity.

14. A. made a purchaſe of a *leaſe of a houſe in B.'s name*, and takes a *declaration of truſt to permit A. to enjoy for life, and then* in truſt for one who lived with him as his wife, and was reputed as ſuch. Ld. Wright inclined that this leaſe was not aſſets of A. nor liable to his debts after his death; for when a man *purchaſes*, he may ſettle the eſtate as he pleaſes. 2 Vern. 490. pl. 442. Hill. 1704. Fletcher v. Lady Sidley.

1 Vern. 62, 63. pl. 59. Mich. 34 Car. 2. in caſe of Jenks v. Holford. S. P. but there ſaid theſe things were trifles, and not a new invention for which a man hath a patent, for that may veſt a property.

15. On a queſtion in Canc. whether the widow was to account to executors for the *receipt of Tipping's water?* Ld. Parker declared, that *if the ſecret was imparted to her by her huſband*, then it became a matter of her own knowledge, part of her underſtanding, which could not be taken from her; *but if ſhe learnt the art by finding the receipt after her huſband's death, or had the knowledge communicated to her by any ſervant*, &c. then the executors were to have the benefit of this receipt. Mich. 8 Geo. Canc. Tipping v. Tipping.

Order was, if imparted to her without any particular truſt, then ſhe was intitled to benefit of it, but if the ſecret was lodged in her on any truſt, then ſhe to account for all the profits ſhe had made thereof.

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16. If a man *deviſes all his lands, tenements, and hereditaments in Dale, in truſt to pay his debts and legacies*, and the *teſtator has ſome freehold and ſome copyhold* lands there, only the freehold lands ſhall paſs; for his will muſt be intended of ſuch lands and tenements as are deviſable in their nature. Secus if the teſtator had ſurrendered his copyhold lands to the uſe of his will, becauſe this ſhews he did intend to deviſe his copyhold; but even in the firſt caſe, *if the freehold were not ſufficient to pay his debts*, when the teſtator deviſes all his lands in truſt to pay his debts, it ſeems rather than the debts ſhould go unpaid, that the copyhold ſhall in equity paſs. 3 Wms.'s Rep. 322, 323. pl. 83. Trin. 1734. Heſlewood v. Pope.

17. An *advowſon in fee* which deſcended to the heir, had been adjudged on an appeal to the Houſe of Lords to be aſſets to pay debts where the heir was bound. 3 Wms.'s Rep. 399. Mich. 1735. in caſe of Robinſon v. Tonge.

## (H. a) In what Actions an Executor may be charged.

[1.] IF a *gaoler* ſuffers a man in execution to *eſcape* and dies, his executors ſhall not be charged in *debt* for this, becauſe they ſhall

ſhall *not be charged without ſpecialty.* * 41 Aſſ. 15. adjudged. D. 15 Eliz. 322. 25.] * Noy, 44. S. C. cited, & S. P.

agreed per Curiam.——It lies not againſt the executor, becauſe it was founded upon a tort which moritur cum perſona. 9 Rep. 87. a. cites S. C. and 40 E. 3. tit Executor, 74.

[2. If a *ſheriff levies money on a fi. fa.* upon an execution upon a judgment, and *doth not deliver it* to the plaintiff in the action, and dies, action of *debt* lies againſt his executor, becauſe this is not grounded upon ſuch tort which is called *maleficium*, viz. a mere tort, but upon a *contract in law*, ſcilicet, *by receipt of the money*, by which a debt accrues to the plaintiff by implication of the law upon a contract in law, and for this an action of debt lies as well againſt him as againſt the teſtator. P. 15 Car. B. R. adjudged per Cur. this being a matter moved in arreſt of judgment. PACKINGTON v. CULLIFORD.] See tit. Debt (K), pl. 17. and the notes there.

3. Writ of *covenant* lies againſt executor. Br. Executor, pl. 161. cites T. 11 E. 3. & Fitzh. Executor, 77.

4. The biſhop of C. ſuppoſed a *cuſtom that the ornaments of the chapel of his predeceſſor*, and ſuch other goods as he received of the executors of his predeceſſor, *ſhall go to the ſucceſſor*, and that ſuch goods, &c. came to the hands of A. and B. executors of his predeceſſor, and prayed ſcire facias againſt them, and had it, and the ſheriff returned that they *were clerks, and nihil habuerunt in laico feodo*, by which fieri facias de bonis eccleſiaſticis iſſued to the biſhop, who ſequeſtered certain goods of the executors. Br. Scire Facias, pl. 106. cites 21 E. 3. 48.

5. *Detinue againſt executors is by reaſon of the bailment*, for he who had the poſſeſſion againſt whom the action was brought, ſaid that he had another executor not named, judgment of the writs, and the plaintiff confeſſed it, and was nonſuited, notwithſtanding that he counted upon a coming to his hands, &c. Br. Executors, pl. 28. cites 41 E. 3. 30, 31.

6. *And* ſee 14 H. 3. 23, 24. there it was adjudged, that in *detinue againſt ſeveral*, the one executor alone ſhall render alone where the one appears, and the other not at the diſtreſs, quod nota; therefore there they are charged as executors. Ibid. [ 246 ]

7. *Warden ſuffered a man condemned in treſpaſs to eſcape*, and died, and writ of debt was demanded againſt the executors of the warden, and it was denied per Ingleby, becauſe there is no ſpecialty; and note, that the ſtatute which gives debt upon eſcape is R. 2. But ſee Weſtm. 2. cap. 12. which gives action upon the eſcape in account, and therefore it ſeems that this is by the ſame equity. Br. Eſcape, pl. 28. cites 41 Aſſ. 15.

8. Detinue does not lie *againſt executors, unleſs by reaſon of the poſſeſſion*, and of things bailed to the teſtator. Br. Detinue de biens, pl. 19. cites 11 H. 4. 46.

9. Executors are not charged in action of *detinue, unleſs by the poſſeſſion of the goods*, and *not by reaſon of the bailment*, quod nota; and therefore the action ſhall be brought where the teſtator died, and not where the bailment was made to the teſtator. Br. Executors, pl. 10. cites 3 H. 6. 35.

10. Executor

10. Executor ſhall not be charged in debt *for eating and drinking of their teſtator*; for he might have waged his law *contra* elſewhere, *where keeper of a priſon brought ſuch an action* for eating and drinking of his priſoner; for he may not ſtarve him. Br. Executors, pl. 79. 13 E. 4. 16.

Note that where it was ruled in B. R. upon writ of error by deliberation, 12 H. 8.

11. Action upon the caſe was brought againſt an executor of the promiſe or *aſſumpſit made by their teſtator* in his life *by parol*; but it is held that it is error. Br. Executors, pl. 171. cites 12 H. 8. 11. that action upon the *caſe* lies well againſt the executor *upon the aſſumpſit of the teſtator*, if they have aſſets. Fitznerbert J. ſaid clearly, that this is not law, and that no ſuch action lies; therefore quære; for 37 H. 8. agrees with Fitzherbert. Br. Action ſur le Caſe, pl. 4. cites 27 H. 8. 23.

And. 24. pl. 53. S.C. accordingly. —Bendl. 87. pl. 132. S. C. accordingly. ——Co. Litt. 294. b. S. C.

12. *Attaint* upon the ſtatute 23 H. 8. was brought againſt executors for judgment obtained by teſtator by verdict on a falſe oath. D. 201. b. 65. Trin. 3 Eliz. Auſtin v. Baker.

Cro. E. 555. pl. 11. S.C. and S. P. held accordingly by three juſtices, but Popham e contra; but afterwards upon better adviſement he held accordingly, and judgment for the defendant. ——Poph. 120. S. C. held accordingly. ——Goldſb. 120. pl. 6. S. C. held by three juſtices, but Popham e contra. ——But ſee Hellier v. Caſebert, and Coghill v. Freelove e contra.

13. If the *executor of a leſſee for years aſſigns over* his intereſt, action of *debt* does lie againſt him for rent due after the aſſignment. And if a leſſee for years aſſigns over his intereſt, and dies, the executor ſhall not be charged for rent due after his death; for by the death of the leſſee the perſonal privity of the contract as to the action of debt in both caſes is determined. 3 Rep. 24. a. the reporter cites it as unanimouſly agreed by Popham Ch. J. Clench, Gawdy, and Fenner, Juſtices, Trin. 37 Eliz. B. R. in caſe of Overton and Sydhall.

14. *Debt* againſt an executrix on an *arbitrement* made in the time of teſtator does not lie, becauſe the teſtator might have waged his law. Cro. E. 557. pl. 12. Paſch. 39 Eliz. B. R. Hampton v. Boyer.

Action of account does not lie againſt executor nor adminiſtrator; for the law does not intend them privy to the account, ſaid to be clear law. D. 23. a. pl. 145. Trin. 28 H. 8.

15. Executor cannot be charged in action of account, but at the ſuit of the king only. 11 Rep. 89. b. Hill. 4 Jac. in the E. of Devonſhire's caſe.

* [ 247 ]

16. An action of debt lies againſt an executor of a leſſee for years, for rent arrear after the death of the leſſee, though the executor never entered nor agreed, becauſe he repreſents the perſon of the teſtator, and though the rent exceeds the profit of the land, yet the executor cannot waive the land, but ſhall be charged with the rent. Yelv. 103. Mich. 5 Jac. B. R. agreed by 3 juſtices. Houſe v. Webſter. And cites the opinion of Aſcue, 21 H. 6. 24. and 11 H. 4. contra, but they were denied to be law.

17. Two

17. Two retain an attorney. Both die. The executor or *adminiſtrator of ſurvivor* ſhall be *charged only*, and not the executors of both; for a *perſonal contract ſurvives* of both parties, otherwiſe of real contracts, as warranty; and on action againſt executors of both, they pleaded jointly, and judgment for the attorney, but ſtayed on motion, becauſe the executor of ſurvivor was only chargeable, notwithſtanding the pleading and admiſſion of the parties. 2 Brownl. 99. Trin. 9 Jac. in a note cites 16 H. 7. 13. a. and 3 Rep. Sir William Herbert's caſe, and 30 E. 3. 4. 17 E. 3. 8.

18. In aſſumpſit againſt an executor, the plaintiff declared that the teſtator, in conſideration of 3l. paid to him, had *promiſed to deliver up ſuch a bond, in which the plaintiff was bound to him, &c.* and averred that he paid the 3l. and that teſtator had not delivered the bond, but had put the ſame in ſuit. After a verdict for plaintiff, it was objected in arreſt of judgment, that an aſſumpſit would not lie againſt an executor upon ſuch collateral promiſe of the teſtator, but adjudged in B. R. that it would; whereupon a writ was brought in the Exchequer-chamber, and there the judgment was affirmed by ſix juſtices againſt the opinion of Tanfield; and ſaid, that if there had been a deed of covenant in this caſe, an action of covenant would lie, and that the reaſon is the ſame upon a promiſe of the teſtator, where he had received a valuable conſideration. Palm. 329. Hill. 20 Jac. Carter v. Foſſett.

Cro. J. 662. pl. 14. Fawcet v. Charter S. C. Tanfield Ch. B. took a difference between a promiſe to do a collateral act, and a promiſe to pay a ſum of money, which is a duty certain, by the teſtator for the not doing whereof action lies againſt the executor. But Hobert and all the other juſtices of C. B. and barons of the Exchequer held that there is no difference, but that in either caſe the action is maintainable againſt the executors on a promiſe of the teſtator; and ſo it has been often adjudged in this king's time, though it was held otherwiſe in Queen Elizabeth's time, and divers judgments reverſed for this cauſe, but that of late the opinions of both Courts are reconciled, and reſolved that the action lies againſt the executor as well in the one caſe as in the other; and the judgment was affirmed. —— Jo. 16. pl. 3. Fawſet v. Carter, S. C. and judgment in B. R. affirmed in Cam. Scacc.

19. Action lies not againſt executor for a *treſpaſs* committed by teſtator, *upon the goods, perſon, or lands* of another. For *actio perſonalis moritur cum perſona.* Went. Off. Ex. 126.

20. If *ſheriff*, gaoler, or keeper of a priſon, *ſuffers an eſcape* of one in execution for debt or damages, and dies, no action lies; for this is in nature of a treſpaſs. Went. Off. Ex. 126.

21. Action lies not (as he thinks) againſt executor, for teſtator's *carrying away his corn* and hay, without ſetting out the tithe, though the treble value be recoverable againſt him in an action of debt; for by teſtator's dying before recovery, the action is gone, even though the teſtator was a leſſee for years, ſo as his eſtate come to his executor. Went. Off. Ex. 127.

22. If A. *arreſts B. at the ſuit of I. S. without the privity of I. S.* or his aſſent, and dies, his executor is not liable. Went. Off. Ex. 127.

23. If A. be *ſubpœnaed to appear as a witneſs*, and has his charges tendered him, but does not appear, and then dies, action lies not againſt his executor. Went. Off. Ex. 127. [ 248 ]

24. The plaintiff demiſed a meſſuage, with a garden, in the pariſh of St. Martin's in the Fields, adjoining to the plaintiff's houſe, Jo. 223. pl. 3. S. C. adjudged, and the dif-

ference is between a covenant in deed and a covenant in law, and that in the laſt caſe it does not lie againſt the firſt leſſee after the aſſignment; but upon a collateral covenant it lies only againſt the firſt leſſee.

houſe, to the teſtator for 21 years, who by indenture covenanted for him, his executors, and aſſigns, that he would not erect any building in the garden to prejudice the plaintiff's lights in his houſe, and that the aſſignee of the ſaid teſtator contrary to the covenant had erected an houſe in the ſaid garden to the prejudice of the plaintiff's lights in his houſe; the defendant ſaid, that the leſſee aſſigned over his term to J. S. who paid the rent to the plaintiff, and that he accepted of him for his tenant, and ſo the action did not lie againſt the executor of the firſt leſſee, the privity of the covenant being determined; and ſo alſo covenant doth not lie againſt him. Reſolved, that in regard it is an expreſs covenant that he ſhall not build, it ſhall bind him and his executors, and no aſſignment nor acceptance of the rent by the hands of the aſſignee ſhall bar him of ſuing him or his executors upon an expreſs covenant, and it was adjudged for the plaintiff. Cro. C. 188. pl. 8. Paſch. 6 Car. B. R. Bachelor v. Gage.

Jo. 430. pl. 2. Perkinſon v. Gilford, S. C. and judgment accordingly niſi.—— See tit. Debt (K) pl. 17. and the notes there.

25. Where a *ſheriff levies money* upon goods *by virtue of an execution, and dies before he pays it to the plaintiff*, his executors are chargeable; for it is not a perſonal wrong, which moritur cum perſona; but when the money is levied *it is a duty* for which his executor ſhall be liable in an action of debt, and the defendant in the firſt action is diſcharged, and ſo is his executor, and may plead it againſt any new execution to be awarded againſt him. Cro. C. 539. pl. 3. Paſch. 14 Car. B. R. Perkinſon v. Gilford.

Sid. 88. pl. 5. S. C. and S. P. by Twiſden J. who ſaid that it had been lately adjudged ſo in C. B.—— Keb. 342. pl. 89. S. C. adjornatur. Ibid. 356. pl. 45. S. C. adjudged for the plaintiff.——S. C. cited Arg. Raym. 72.

26. *Debt* upon the ſtatute of miniſters *for fifths* againſt an executor. The defendant pleads nil debet, and verdict for the plaintiff. Stroud moved for the defendant, that this action ſhall not charge the executor, not being a duty in the teſtator; but by the Court, the executor is chargeable, becauſe it was a duty in the teſtator, but it lies upon the ſtatute of 2 Ed. 6. for tithes; and judgment was given for the plaintiff by the whole Court. Raym, 57, 58. Mich. 14 Car. 2. B. R. Hole v. Bradford.

27. *Eſcape* lies not againſt the executor becauſe the action is founded ex delicto, but it lies upon the ſtatute 2 Ed. 6. *for tithes*; and judgment was given for the plaintiff by the whole Court. Raym. 57, 58. Mich. 14 Car. 2. B. R. Hole v. Bradford.

28. The *plaintiff delivered a cow to R. B. to keep in his paſture, who ſold the cow, and converted the money* to his own uſe. Afterwards he made W. B. his executor and died, and an action on the caſe being brought againſt the executor, the plaintiff had a verdict; but the Court ſaid *this was a tort, and that the executor ought not to be charged with it.* Raym. 71. Hill. 14 & 15 Car. 2. B. R. Baily v. Birtles.

Keb. 682. pl. 92. Truſſel's caſe, S. C. the Court

29. There was a ſuit in the ſpiritual court for double damages againſt the teſtator on ſtat. 2 E. 6. cap. 13. for not ſetting out tithes, pending which ſuit he died, and afterwards they ſued his executor for double damages; but adjudged in B. R. that he was

not chargeable, becauſe this was a perſonal wrong done by the teſtator, for which by the common law his executors ſhall not anſwer; per Windham and Keeling J. 1 Sid. 181. pl. 20. Hill. 15 & 16 Car. 2. B. R. Weekes v. Truſſell.

would not prohibit, but Keeling doubted. —Raym. 95. Wilks v. Ruſſell, S. C. a prohibition was denied.

30. Executors are bound by *covenant of apprenticeſhip* to teach the apprentice his trade, and they ought to ſee the apprentice taught his trade; and if they are not of the trade, they ought to aſſign him to another who is ſo, that he may be taught according to the covenant. Lev. 177. Trin. 17 Car. 2. B. R. Walker v. Hull.

31. If the *ſame perſon is heir and executor*, he may be charged in ſeveral actions as heir and as executor by the ſame perſon for the ſame debt. 3 Lev. 303, 304. Paſch. 2 W. & M. in C. B. Haight v. Lanham & Ux'.

32. 4 & 5 *W. & M. cap.* 20. *ſ.* 3. *enacts that no judgment, not doggeted as directed ſ.* 2. *ſhall have any preference againſt exccutors or adminiſtrators in their adminiſtration.* Made perpetual by 7 W. 3. cap. 36.

33. Executor or adminiſtrator ſhall be puniſhed for *waſte*, whether *voluntary or permiſſive*, though treble damages are recoverable in it. 12 Mod. 371. Paſch. 12 W. 3. per Cur. Arg. Keeling v. Morrice, cites 1 [2] And. 51, 52. pl. 38. 5 Co. Hargrave's caſe, All. 42.

34. 4 & 5 *Ann. cap.* 16. *ſ.* 27. *gives account againſt executors of guardians, bailiffs, and receivers, and for one jointenant or tenant in common, his executors and adminiſtrators, againſt the other as bailiff, and againſt the executors or adminiſtrators of ſuch jointenant or tenant in common.* By the ſtatute for the amendment of the law it is enacted, that actions of account and an action of account was brought upon this ſtatute againſt the defendant as bailiff ad merchandizandum, who waged his law; and upon demurrer it was objected, that wager of law would not lie in account againſt a bailiff ad merchandizandum; but if ſuch action had been brought againſt a receiver, and the plaintiff did not ſhew by whoſe hands, there wager of law would lie; and ſo it was adjudged in this caſe for the plaintiff.

may be brought againſt the bailiff or receiver for receiving more than his juſt ſhare,

35. If an executor takes poſſeſſion of a term of the teſtator's, and an action is brought againſt him in the *debet and detinet for rent*, or an action of *covenant for not repairing*, he cannot plead *plene adminiſtravit*, for that confeſſes a miſapplication, ſince no other payment out of the profits can be juſtified till the rent is anſwered; but if the *rent is more worth than the land*, the defendant may diſcloſe that by ſpecial pleading, and pray judgment whether he ſhall be charged otherwiſe than by *detinet only*; per Parker Ch. J. and Powell J. 1 Salk. 317. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk. It is abſurd in ſuch caſe to plead no aſſets ultra what will pay ſuch and ſuch judgments, becauſe in ſuch a caſe the ſurplus of the profits (rent and repairs deducted) is all that is aſſets, and liable to the judgments, and the reſt are ſo appropriated to the payment and repairs as not to be exhauſted by debts. 10 Mod. 12. Mich. 9 Ann. B. R. Buckley v. Pirk.

## (H. a. 2) Chargeable; in what Caſes, though not named.

1. *A Covenant lies againſt an executor in every caſe*, although he be not named, *unleſs* it is to be *ſuch* a covenant *as is to be performed by the perſon of the teſtator, which they cannot perform.* [ 250 ] Cro. E. 553. pl. 3. Paſch. 39 Eliz. B. R. in caſe of Hyde v. Windſor (Dean and Canons).

Keb. 761. pl. 70. Wadſworth v. Guy, S. C. Hyde conceived this general covenant to inſtruct is not gone by his death, although there be no particular cuſtom, as in London eſpecially, ſince 5 Eliz. to which the Court inclined; ſed adjornatur.——Ibid. 820. pl. 104. S. C. all the Court inclined, that had it been only to inſtruct and find meat is not; and if it were, yet the breach is ſufficiently aſſigned if either part is true, as here, in turning them out; judgment for the plaintiff.

2. *Teſtator was bound to inſtruct an apprentice in trade for ſeven years, and* likewiſe bound *to find him meat, drink, &c. and lodging, during the term.* The Court held, that the apprentice remained apprentice to the executor; for though he cannot inſtruct him in the trade, yet he may find him meat and drink during the ſeven years, and that the word (term) does not determine, but outlaſts the life of the teſtator as to this. Sid. 216. pl. 21. Trin. 16 Car. 2. B. R. Wadſworth v. Gye.

3. *But afterwards*, where teſtator covenanted to teach an apprentice his trade, and died, and covenant was brought againſt his executor, after a verdict for the plaintiff it was moved in arreſt of judgment that this was a perſonal covenant of teſtator, and did not oblige the executor, but the maſter only during his life; but *adjudged that the executor was likewiſe bound*, for he ought *to ſee the apprentice taught his trade, and if he was not of the ſame trade, then to turn him over to another who is*, ſo that he may be taught according to the covenant. 1 Lev. 177. Trin. 17 Car. 2. B. R. Walker v. Hull.

## (H. a. 3) Charged upon Covenant or Agreement, &c. of the Deceaſed.

1. IF a man *demiſes ſheep or other ſtock of cattle, or any other goods perſonal for any time, and the leſſee covenants for him and his aſſigns to leave them, &c. at the end of the term in as good condition as he found them*, and afterwards he *aſſigns over the ſtock of cattle and dies*, this being merely a choſe en action in the perſonalty cannot bind any but himſelf, his executors or adminiſtrators who repreſent him; ſo of a leaſe of a houſe, and a ſtock or ſum of money. 5 Rep. 16. b. Paſch. 25 Eliz. B. R. the third reſolution in Spencer's caſe.

2. If one *covenants to pay* 10*l.* debt lies againſt him or his executors, as 40 E. 3. and 28 H. 8. Dyer are; but if he doth *covenant that his executors ſhall pay* 10*l.* an action lies not againſt them.

Cro. E. 232. pl. 2. Paſch. 33 Eliz. C. B. in caſe of Perrot v. Auſtin.

3. The caſe was, *A. covenanted with B. to put his ſon an apprentice to C. or otherwiſe that his executors ſhould pay* 20*l*. *A. doth not put his ſon apprentice* to C. and dies. Reſolved, that debt lies not againſt the executors of A. for it cannot be a debt in the executor where it was no debt in the teſtator. Ibid.

Covenant lies againſt executors upon a writing, by which the teſtator covenanted to be accountable for all ſuch monies as ſhould be charged by the covenantee to be paid to J. S. Lev. 47. Mich. 13 Car. 2. B. R. Brice v. Carr, Emerſon & al'. ——— Cro. J. 570. contra, for the goods of teſtator are only chargeable, which he may well bind. Goodwin v. Goodwin.

4. W. being lord of a manor *covenanted for himſelf, his heirs, and executors, within ſeven years, upon requeſt to convey a copyhold to the plaintiff for life, ſecundum conſuetudinem manerii.* The covenantor died, and the *plaintiff required his executor to convey the copyhold, which he refuſed,* and thereupon he brought the action. It was objected, that the declaration did not ſhew what eſtate W. had in the manor, and therefore it ſhall be intended a fee-ſimple; and if ſo, then the requeſt ought to be made to the heir, and not to the executor; but per Dodderidge J. it ſhall be rather intended that he had only an eſtate for years, and that the executor repreſents the perſon of the teſtator as to the performance of thoſe covenants which he was bound to perform, which he ought to do, though the teſtator had no eſtate at all in the manor; and all agreed that the *requeſt to the executor is good,* and that his not performing it was a breach of covenant; and judgment was given for the plaintiff. 2 Bulſt. 158. Mich. 11 Jac. Thurſeden v. Warthen's executors. [ 251 ]

5. In the caſe of a *mortgage of a ſhip,* where *the ſhip was taken at ſea,* and there was *no covenant for payment of the money,* and though the ſhip could not properly be ſaid to be in nature of a pawn or depoſitum, ſince the mortgagor had ſailed with the ſame to ſea, nevertheleſs the *executors of the mortgagor were decreed to pay the money* for which the ſhip was mortgaged. 3 Wms.'s Rep. 360. cited as decreed by Ld. Harcourt, Trin. 1735. King v. King.

## (H. a. 4) Chargeable.

### On Promiſes made by himſelf.

1. THE defendant being *executor to a debtor of the plaintiff, did promiſe that if he did take upon himſelf the adminiſtration he would pay him his debt;* but this was held no conſideration, being moved by Holt in arreſt of judgment. Freem. Rep. 434. pl. 585. Mich. 1676. B. R. Day v. Caudrey.

2. 29 *Car.* 2. *cap.* 3. *ſ.* 4. *Executor ſhall not be charged on a promiſe or agreement to anſwer damages out of his own eſtate, unleſs by writing ſigned.*

## (H. a. 5) Favoured, indemnified, or charged.

### In reſpect of the Fund out of which Legacies are to ariſe diminiſhing in their Value.

1. A. Made his will, and gave ſeveral legacies, and made B. his kinſman executor and reſiduary legatee; *great part of his eſtate conſiſted in Eaſt India ſtock*, and he by his will *directed his executor to turn his eſtate into money as ſoon as conveniently might be*; Eaſt India *ſtock bore then a good price, and ſeveral of the legatees called for the legacies*, and the executor, taking the eſtate to be ſufficient to pay all, gave them *bonds for their legacies, but kept the ſtock* ſo long *till it fell* ſo low that he had not aſſets to pay the legacies, and the executor brought his bill to have thoſe to whom he had given bonds for their legacies to abate, and that thoſe that were unpaid
[252] might take their legacies in proportion at the rate the ſtock was then at; but Ld. Keeper would not give him any relief againſt thoſe that had bonds; and as to the others, he was to *anſwer for the ſtock at the value it was of at the end of the year after teſtator's death.* Abr. Equ. Caſes, 239. Hill. 1702. Kegling's caſe.

## (I. a) In an Action brought againſt Executors, how the Plaintiff ought to demean [or plead] for Debt of Teſtator.

[1. IN an action upon the caſe upon a contract made by the teſtator, the plaintiff *need not aver that the defendants have aſſets to pay legacies.* 9 Rep. 90. b. PINCHON'S CASE. Pl. C. 182. b. adjudged, NORWOOD AGAINST READ.]

[2. 3 Eliz. 9 Rep. 90. b. In action upon *aſſumpſit* by teſtator for payment of a debt, adjudged that he need not *aver that executor has aſſets* to ſatisfy the debts of the teſtator.]

### Upon Aſſumpſit by the Executor.

And in ſuch caſe he ought to be ſued in his own name, for the demand is upon his own contract.

[3. 9 Rep. 94. Bane's caſe. The executor promiſed to pay a debt (due by a teſtator) at Michaelmas next, *if he would forbear to ſue him before.* In action upon this aſſumpſit, the plaintiff need not *aver* that the executor had *aſſets to the value* of the debt at the time of the aſſumpſit, for the law * intends that he had.]

In effect the forbearance is the conſideration of the promiſe, becauſe without forbearance no advantage could be taken of this promiſe. Per Parker Ch. J. and to this opinion the reſt of the Court inclined. Sed adjornatur. 10 Mod. 254. Trin. 13 Ann. Johnſon v. Gardiner.

* Otherwiſe he would not have made any ſuch promiſe. Cro. J. 602. pl. 27. Mich. 18 Jac. B. R. Bard v. Bard.——613. Booth v. Crompton. S. P.

4. In

4. In debt againſt *executors*, if it be founded *upon a true cauſe, he may ſuffer a recovery by nient dedire*, and ſhall have thereof allowance in action brought againſt them by another to plead this execution. Br. Executor, pl. 88. cites 9 E. 3. 12. 314. Per Littleton, Chocke, and Brian.

5. *So* where they *confeſs the action*, if it be true. Ibid.

6. A man bought wares of another, and J. S. *promiſed that if the vendee did not pay*, that *he would*, and after the *vendee died, and did not pay*, and J. S. made executors, and died, and the *vendor brought* action upon the *caſe againſt the executors of J. S.* upon the aſſumpſit of the teſtator, and averred that they have aſſets to pay the debts and legacies, and to ſatisfy this ſum, and the action awarded good by award in B. R. in the time of Fineux; but now it is doubted in that court, and C. B. was always of opinion that the action does not lie. Br. Action ſur le Caſe, pl. 106. cites 12 H. 8. 11.

Upon citing this caſe by Plowden Pl. C. 182. Paſch. 4 Mar. in the caſe of Norwood v. Read, Fitzherbert bid them to put this caſe out of their books, for that doubtleſs it is not law. And it was alſo ſaid that the authority of this caſe was impeached by Fitzherbert being of counſel with the plaintiff in that very caſe, and with whom judgment was given, and he being a judge of great fame held it erroneous; and that in fact it ſeems againſt the principles of law, becauſe ſuch aſſumpſit is only a contract en pais, as a contract of debt is. But it was anſwered, that the ſaid judgment in 12 H. 8. is not ſo eaſily to be rejected by the ſaying of Fitzherbert. And the juſtices ordered the record of 12 H. 8. to be ſearched and ſhewn to them, and ſo it was; and the caſe was entered, Mich. 12 H. 8. Rot. 40. and was between CLAYMOND plaintiff, and VINCENT & Ux' executrix of the will of R. Penſon, defendants, and it was not demurred in law upon the caſe, but the defendants pleaded in bar as by the record appeared; and the record was not according to the book in this point, viz. for the averment as to paying legacies, but the averment of the aſſets was for the payment of all debts, and alſo to content the plaintiff; and to pay the legacies was not contained in the record; whereupon judgment was given in the principal caſe of Norwood v. Rede accordingly.

7. *Scire facias as adminiſtrator* of G. *upon a recognizance* of 4000l. being found for the plaintiff, it was moved in ſtay of judgment, that it is *not mentioned in the writ, quod profert literas adminiſtrationis*, &c. but becauſe it was in a writ *founded upon a record*, and the courſe is not to mention it in writs, the Court held it to be well enough. Cro. E. 592. pl. 30. Mich. 39 & 40 Eliz. in Canc. The E. of Shrewſhury v. Sir Walter Lewſon. [ 253 ]

8. Aſſumpſit; a *legacy* of 40l. *was deviſed to the plaintiff* by J. S. who made the defendant his executor, and divers goods came to his hands, the defendant *in conſideration the plaintiff would forbear* to ſue him *promiſed to pay it at ſuch a time*. It was moved in arreſt of judgment, that the declaration was not good becauſe he doth *not aver that he had aſſets at the time of the promiſe*, ſed non allocatur; for it ſhall be intended he had, otherwiſe he would not have made ſuch a promiſe; wherefore it was adjudged for the plaintiff. Cro. J. 613. pl. 2. Paſch. 19 Jac. B. R. Booth v. Crampton.

9. In the caſe of an executor the creditor muſt *bring the action for the ſum really due, be the aſſets never ſo ſmall*, for judgment muſt be for the whole debt; and this ſeems to be for the preventing a freſh action in caſe of more aſſets. 10 Mod. 324, 325. per Cur. Hill. 2 Geo. 1. B. R. Baldwin v. Church.

Fol. 622.

## (K. a) How Executors ought to demean themſelves in an Action againſt them.

### How they ought to plead Judgments firſt to be paid.

Vaugh. 103. Trin. 22 Car. 2. C. B. in caſe of Edgcomb v. Dee. Vaughan Ch. J. ſaid he agreed, that if the defendant pleads ſeveral judgments againſt the inteſtate, or himſelf as adminiſtrator, and ſtatutes entered into by the inteſtate, and concludes this plea, that he hath not, nor at any time had, aſſets in his hands of the inteſtate's eſtate, præterquam bona & cattalia ſufficient to ſatisfy thoſe judgments and ſtatutes, and avers that they are unſatisfied, and which aſſets are chargeable with the ſaid judgments and ſtatutes, that this is a good plea in bar of the plaintiff's action, and ſo it is admitted to be in Meriel Treſham's caſe; and the plaintiff muſt reply, that he hath aſſets ultra what will ſatisfy thoſe judgments and ſtatutes, as is there agreed.

[1. 9 Rep. 109. b. IN *debt on bond* the executor *confeſſed divers judgments* and recognizances *to be paid, and that he has ſufficient* to ſatisfy them, and after ſaith *that he hath not alia bona, but what are not ſufficient to ſatisfy the debt aforeſaid*; reſolved that this plea is *repugnant*.]

MERIEL TRESHAM'S caſe.

[2. In 9 Rep. aforeſaid, reſolved, if he had *pleaded* that he had *not any bona præterquam bona & catalla quæ non ſufficiunt ad ſatisfaciendum debitum prædictum*, this is not good for the *uncertainty*.]

[3. But he ought *to confeſs* that he has *aſſets* to ſatisfy debitum prædictum.]

But if the plaintiff reply, that any one of thoſe judgments was ſatisfied by the inteſtate in his life time, ſaying nothing to any of the reſt, and the defendant demur upon this replication, the plaintiff muſt have judgment, for the plea was falſe, and the falſehood detrimental to the plaintiff, and beneficial to the defendant; for having pleaded he had no more aſſets than would ſatisfy thoſe judgments, one of them being ſatisfied before, he hath confeſſed there is more aſſets than will ſatisfy the other judgments, by as much as the judgment already ſatisfied amounts unto, which would turn to his gain, and the plaintiff's loſs, if his demurrer were good.

But to plead, that he hath not bona & catalla præterquam bona quæ non attingunt, to ſatisfy the ſaid judgments and ſtatutes, is not good for the incertainty; for if the judgments and ſtatutes amount to 500l. 20l. are bona quæ non attingunt to ſatisfy them; ſo is 40l. ſo is 100l. ſo is 200l. and every ſum leſs than will ſatisfy; ſo as by ſuch plea there is no certain iſſue for the jury to inquire, nor no certain ſum confeſſed towards payment of any debt, as is well reſolved in Turner's caſe.

* So if a man pleads he hath not aſſets ultra what will ſatisfy thoſe judgments, the plea is bad for the ſame reaſon, for 20l. is not aſſets ultra that will ſatisfy them, nor 40l. nor 100l. nor 200l. nor doth that manner of pleading confeſs he hath aſſets enough to ſatisfy; as to ſay, I have not in my pocket above 40l. is not to ſay I have in my pocket 40l.

If executor pleads a judgment generally, he confeſſes aſſets for ſo much, and cannot after ſay he has aſſets for leſs value. 12 Mod. 527. Trin. 13 W. 3. Parker v. Atfield.

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For if a judgment be pleaded in its full extent of the penalty thereof, and the plaintiff replies, that there is but ſo much due, or that the party is willing to take ſo much, or that it is kept up by fraud, and iſſue is thereupon joined, if it be found by the jury that the executor has not wherewithal to ſatisfy it he ſhall *not* be *charged for more, becauſe* there he is *not guilty of fraud*. Per Holt. Ch. J. 12 Mod. 527. Trin. 13 W. 3. Parker v. Atfield. ——— But if the executor has no aſſets at all, his *beſt way* had been *to plead* the judgments and ſpecialties in their order, but he muſt take care to plead them honeſtly, for if any one of them be falſe, he is gone for all; ſo that if there be a *miſtake* in the pleading *or fraud*, it is a devaſtation, if iſſue be taken upon the fraud and it is found; but if you are not found to have aſſets for the whole judgment, it ſhall not be intended you have more than you confeſſed; for the fraud is the only thing traverſable; per Holt. Ch. J. 12 Mod. 528. Trin. 13 W. 3. Parker v. Atfield. ——— 1 Salk. 311. pl. 16. S. C. ——— Ld. Raym. Rep. 678. S. C. accordingly.

[4. Or *if the truth be that he has not to ſatisfy the debts of record*, then he *ought to confeſs how much* goods he has *ſcilicet ad valentiam* of a certain ſum, & *non ultra quæ not ſufficiunt ad debitum prædictum, &c.*]

[5. 9 E. 4. 12. In *debt* the executors *plead a judgment and execution of* 200*l.* *and another judgment of* 100*l.* *recovered* of the goods of teſtator againſt them, *abſque hoc that any of the goods of teſtator were in their hands the day of the writ purchaſed, or after, except to the value of the ſaid* 200*l.* *ſo levied,* and the Court ruled the plea good, and if the plaintiff will maintain his action he ought to ſay that they have aſſets beyond the 200l. and 100l.] Br. Executor, pl. 88. cites 9 E. 3. 12. 314. but it ſhould be 9 E. 12. 14. and ſo are the later editions.

[6. If an executor *has no aſſets over a judgment,* if he does not plead in an action brought againſt him *fully adminiſtered,* he *cannot give the judgment in evidence.* 21 E. 4. 21. b.] Sty. 378. Trin. 1653. Newman v. Maſſey; per Roll Ch. J. if the defendant pleads plene adminiſtravit, he muſt depend upon the ſpecial plea, and not vary from it by ſhewing new matter; and judgment was given accordingly.

[7. But in ſuch caſe he *ought to plead the judgment ſpecially,* and over this nothing in his hands. 21 E. 4. 21. b.]

8. 9 *E.* 3. *ſtat.* 1. *cap.* 3. *if debt be brought againſt divers executors they ſhall not fourch by eſſoin, but ſuch as appear ſhall anſwer without the reſt.*

9. *Debt againſt executors* who *pleaded recovery by A. againſt them of* 200*l.* *whereof he had execution, and that B. had recovered againſt them* 100*l.* per Brian, he need not allege the laſt recovery, becauſe he has pleaded no execution thereof, nor aſſets; but ſaid, that riens enter mains the day of the writ purchaſed, nor after, but that which ſatisfied the 200l. and ſo need not to mention the ſecond recovery. Pigot ſaid, we could not plead otherwiſe; for if we have goods over the 200l. we are chargeable to the ſecond recovery, and not to the now plaintiff. Br. Tail Exchequer, pl. 2. cites 9 E. 4. 12.

10. Debt was brought *againſt J. S. as executor by A.* and pending this action debt was brought *by B. againſt J. S. as adminiſtrator* for a true debt (whereas J. S. *was executor*). J. S. *confeſſed B.'s action,* and *pleaded the recovery* in bar of A. But reſolved not good; for the recovery againſt him as adminiſtrator was void. Cro. E. 41. pl. 5. Trin. 27 Eliz. C. B. Anon.

11. *Three adminiſtrators;* in *debt againſt one* on a bond, judgment is by *nihil dicit.* Afterwards debt was brought on a bond by another perſon againſt all three; they pleaded the former judgment againſt one, and that they had riens en ſes maines to ſatisfy over and above the ſaid debt, and good. Cro. E. 471. pl. 23. Hill. 38 Eliz. B. R. Further v. Further. S. C. cited Sid. 333. Paſch. 19 Car. 2. B. R. per Curiam. [255]

12. Debt againſt an executor, who *pleaded, that pending that action T. S. brought another action againſt him for* 100*l.* *pro vero & juſto debito* due to him from his teſtator, *and that he had confeſſed judgment in that action, and had not aſſets ultra,* to ſatisfy that judgment; the *plaintiff proteſtando, that it was not a true debt, pro placito ſaith that this recovery was by covin to defeat him of his debt,* &c. and upon demurrer all the Court held this replication good enough; for if the recovery be not by covin the plaintiff is barrable, and therefore it is the principal matter to be anſwered, and the conuſance of the action is not material, viz. whether it be a true debt and an action truly purſued, and an action may be covenous though Brownl. 50. S. C. held accordingly. ——Lutw. 662. Trin. 11 W. 3. in caſe of Robinſon v. Corbet, it was ſaid by Powell J. that the plaintiff cannot inſiſt upon any

thing but the fraud, and that the opinion in the case of GREEN v. WILCOCKS, Cro. Eliz. 462. had been a long time exploded, and that it is not necessary to plead that the judgment was pro vero & justo debito; because it shall be presumed prima facie.

though it be on a true obligation. But upon error brought the judgment was reversed for the matter in law; for it *cannot be a covenous recovery if the debt be true*, and the covin alleged is not material. Cro. E. 462. pl. 10. Hill. 38 Eliz. B. R. Green v. Wilcocks.

13. *Debt against the defendant as administrator* of F. he *pleads a recovery against him as executor, and besides, to satisfy that, he hath no assets*; adjudged a good plea, for that he shall not be twice charged. Cro. E. 646. pl. 57. Mich. 40 & 41 Eliz. B. R. Smallpeace v. Smallpeace.

14. Debt against an administrator who *pleaded a recovery in debt* against him in London, *and that he had not assets prater* to satisfy that judgment. The plaintiff *replies, and confessed that judgment, but shews that before this action brought the plaintiff in that action acknowledged satisfaction on record*; and upon demurrer it was adjudged for the plaintiff, because satisfaction being acknowledged he cannot plead that he hath nothing, &c. because the judgment is discharged by this satisfaction acknowledged without any other judgment. Cro. E. 728. pl. 4. Mich. 41 & 42 Eliz. C. B. Hampton v. Bartholomew.

15. *Debt* was brought against an executor *on a bond* of 300l. who *pleaded that his testator entered into a statute to T. S. for* 300l. *and that he had but* 80l. *of the testator's in his hands, and that the statute was yet in force and unpaid*; this was held an ill plea, because the defendant did *not allege that the statute was made for debt, and that the debt was not satisfied*. For that it was made for *performance of covenants*, and probably there may be no covenants broken, nor ever may be, and if so, then it is no good plea in bar to the action. Cro. J. 8. pl. 10. and 35. pl. 8. Trin. 2 Jac. B. R. Philips v. Echard.

16. If an action be brought against an executor, and the *plaintiff doth not aver that defendant hath assets* to pay the debts, it is not material; for the *defendant is to shew that*; for if he had not assets and *pleads non assumpsit*, he hath lost that advantage; affirmed in error. Cro. J. 293. pl. 13. Mich. 9 Jac. B. R. Legate v. Pinchion.

17. Debt against an administrator who *pleaded two recognizances acknowledged by the intestate*, which were *not satisfied, and that he had not goods, &c. praterquam bona & catalla, which did* [*not*] *amount to the debts due, on the said recognizances*; it seemed to all the justices that the plea was not good, but that the defendant ought to have pleaded, that he had not goods praterquam bona to satisfy the said recognizances, or no goods beyond such value, which do
[256] not amount to the said sums due on the same. 2 Brownl. 153. Pasch. 10 Jac. C. B. Charnock v. Corey.

18. *Scire facias* was sued by H. against W. executor to his father, *for execution of a judgment obtained against the testator*; the defendant *pleaded plene administravit at the time of the bringing of the action*;

*action;* and thereupon they were at iſſue; per Cur. it is no good plea, but the executor *ſhould have pleaded, there was nothing in his hands at the time of the teſtator's death,* becauſe the judgment bound him to ſatisfy that debt before others; but by joining of iſſue the advantage of that exception to the plea is waved. Mo. 858. pl. 1178. Hill. 11 Jac. C. B. Harecourt v. Wrenham.

19. *Debt* againſt an executor *upon an obligation of* 40l. the defendant pleaded *three judgments in debt in the court of Rocheſter, and* judgment *in B. R. prout patet per recorda prædicta,* and that he had not aſſets to ſatisfy thoſe judgments, whereupon it was demurred, 1ſt, Becauſe he doth not ſay, *prout patet per ſeperalia recorda,* and *conclude every of them ſeverally prout patet per record'* in the ſaid court, &c. 2dly, It is *not ſhewn what ſums he had in his hands* to ſatisfy ſo as the Court might know and adjudge thereupon. 3dly, Becauſe it is *not averred that they were vera & juſta debita,* whereupon the judgments were given, and Doderidge held it was ill for all thoſe cauſes; but Haughton held it to be ill for the ſecond cauſe, and the Ch. J. for the firſt cauſe, and not for the other; Chamberlain J. was abſent, wherefore they all agreed, that for the one cauſe or other the plea was ill, and therefore it was adjudged for the plaintiff. Cro. J. 625, 626. pl. 19. Mich. 19 Jac. B. R. Samms v. Mercer.

20. If *recovery be had againſt* executor *without good cauſe,* and *by covin* to defraud creditors, the creditor may ſay generally, that it was had by fraud without good cauſe to defraud creditors; but if it was without good cauſe but *no covin,* but by *faint pleading* or negligence the executor ſuffers the judgment, the creditor may ſay that this was without cauſe, and by faint pleading. But if recovery was not had upon *good cauſe but by covin,* the creditor cannot avoid the recovery by ſaying that it was by covin to defraud him, becauſe the party had good cauſe, and where the recovery is upon legal cauſe it cannot be ſaid covinous, though it was upon conſent, and with intent to prevent the other of his debt. Jo. 91. pl. 5. Hill. 1 Car. B. R. Veale v. Gateſdon.

S. C. cited per Gould. J. 12 Mod. 528. Trin. 13 W. 3.

21. In action againſt the executor on a bond made by the teſtator, the defendant *pleaded judgment againſt her, ultra quod non habet,* &c. *not ſhewing what was the ground of the judgment as bonds or ſingle contracts;* for which cauſe, as pro vero debito, the plaintiff demurred, and judgment per Cur. for the plaintiff niſi. Keb. 284. pl. 90. Paſch. 14 Car. 2. B. R. Hutchinſon v. Innocent.

22. Debt againſt an executor who *pleaded a judgment ultra quod he had not aſſets;* the plaintiff demurred ſpecially, becauſe he did *not ſhew the value of the goods which he had.* The Coutt held it to be only form; but being *ſpecially demurred* on, it is ill. Lev. 132. Trin. 16 Car. 2. B. R. Davies v. Davies.

Sid. 210. pl. 6. Davage v. Davage, S. C. in debt on a bond, and

the defendant pleaded that J. S. had recovered 19l. for rent againſt him, ultra quod he had no aſſets; upon demurrer the plea was held ill; for the defendant ought to have pleaded that J. S. had recovered 19l. againſt him for rent, and that he had not aſſets but to ſo much, and ſhewed the ſum in certain to ſatisfy the ſaid 19l. ultra quod he had not aſſets. —— Keb. 734. pl. 14. S. C. held accordingly. —— Though by the right rules of pleading the defendant ſhould ſet down in certain to what value the goods were, yet that is but form; for if he had ſaid that he had goods to the value of 100s. and the plaintiff had proved that he

he had 100l. yet he had gained nothing. Hob. 133. pl. 175. Paſch. 12 Jac. per Hobart and Winch in the caſe of Moon v. Andrews.

S. P. per Holt Ch. J. 12 Mod. 527. in caſe of Parker v. Atfield.

* 23. If an executor *is ſued on four ſeveral bonds of* 20*l. each*, and they *are all tried at once*, and *he has only* 20*l. aſſets*, yet he ſhall be chargeable to them all; but he ſhould have confeſſed a judgment to one of them and have pleaded that to the other. 2 Show. 202. pl. 207. Paſch. 34 Car. 2. B. R. Anon.

24. Debt againſt an executrix, who *pleaded that T. S. had obtained a joint judgment againſt her teſtator, and E. H. who is ſtill living, and that ſhe had not aſſets ultra the ſaid judgment* to ſatisfy. The plaintiff demurred, and adjudged for the defendant, becauſe the lien ſurvives, and ſo the executrix is not liable. Raym. 153. Paſch. 18 Car. 2. B. R. Harvey v. Harvey.

Lev. 200. S. C. and judgment per tot. Cur. for the defendant.—2 Keb. 217. pl. 59. S.C. adjudged accordingly.

26. Caſe againſt an adminiſtrator upon a *promiſe of the inteſtate*. The defendant *pleaded in bar two judgments* had againſt him, *one in debt upon ſimple contract, and the other upon an inſimul computaſſet prout per ſeparalia recorda inde plenius liquet, &c. beyond which he had not aſſets*. The plea was adjudged good *without averring that the judgments were pro veris & juſtis debitis*; for if they were not ſo obtained, the plaintiff ought to ſhew it in his replication, and cites 3 Cro. 471. Further's case. And as to the prout patet per *ſeparalia recorda*, without concluding to each prout patet per recordum, it is well enough, for it *ſhall be taken diſtributively*; and as to the matter of the plea in bar, it was adjudged that *judgments in debt upon ſimple contract are pleadable to this action*, for the debt is not loſt by the death of the teſtator, but his executor is ſtill liable, becauſe an action on the caſe lies againſt him for thoſe things for which theſe debts upon ſimple contracts are brought, and upon which the plaintiff recovered againſt him, and he *need not to uſe dilatories*, but may let judgment paſs againſt him by non ſum informatus, as in this caſe; and though debt upon ſimple contract cannot be maintained againſt an executor if he had demurred to the declaration, yet if he pleads to it, it is good, and the judgment ſhall not be reverſed for that reaſon; and thoſe caſes in 1 And. 182. and 3 Cro. 121. which are to the contrary, are not law; and if this plea is not good, then thoſe payments are a devaſtavit, which it is not; becauſe in action on the caſe on a contract and plene adminiſtravit pleaded, he may give payment on another contract in evidence, and by the ſame reaſon he may ſuffer judgment to paſs againſt himſelf. Sid. 332. pl. 17. Paſch. 19 Car. 2. B. R. Palmer v. Lawſon.

Sid. 404. pl. 11. Parker v. Maſters, S. C. and adjudged a good plea.

27. *Debt againſt ſeveral as executors; they plead a judgment againſt one of them as adminiſtrator.* Plaintiff demurred, 1ſt, Becauſe the action and judgment is as adminiſtrator, which he might have avoided by pleading in abatement that he was executor. 2dly, Becauſe it was only againſt one, whereas it lay not but againſt all; but reſolved that the judgment was pleadable in bar, and as to the firſt point cited 3 Cro. 646. Wheatley v. Lane, adjudged in point in B. R. and as to the ſecond point cited 3 Cro. 437. and though the action was not well brought, the defendant was *not bound*

*bound to plead in abatement*, and put himſelf to greater charge, ſince there was a true debt and a recovery had upon the right of it. Lev. 261. Hill. 20 & 21 Car. 2. B. R. Parker v. Amys.

28. Action was brought againſt an executor, who pleaded ſeveral judgments, but as to the laſt judgment pl[illegible]ded by him, he *did not expreſs where it was entered, nor when obtained*; and this being aſſigned for error, Twiſden J. held it not good, becauſe by this plea he is tied up to plead nothing but nul tiel record; but if the judgment had been pleaded as it ought to have been he might perhaps have pleaded * obtent' per fraudem; and judgment accordingly. Mod. 50. pl. 106. Hill. 21 & 22 Car. 2. B. R. Jordan v. Fawcett.

Vent. 76. Jordan v. Forett, S.C. and judgment affirmed; for if ſuch pleading ſhould be allowed, it would be very difficult to find the record, and then he could not plead that it was kept on foot by fraud or the like. Sid. 449. pl. 12. Jorden v. Foſſet, S. C. and the bar was held ill, and judgment for the plaintiff.

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29. *Debt* againſt an adminiſtrator, who *pleaded a recognizance not ſatisfied, and alſo a judgment in debt for* 5000*l. on a note payable with intereſt upon demand, and that the money being not paid till ſuch a day, the intereſt amounted to* 1700*l. and ſo the judgment was againſt him for* 6700*l. and that he had not aſſets ultra* 40*l. chargeable to this recognizance and judgment*; and upon demurrer the plaintiff had judgment per tot. Cur. For his *pleading a judgment for intereſt is ill*, becauſe it is a devaſtavit in him to ſuffer it to run in arrear, and defect of aſſets to pay it before the incurring of it by the adminiſtrator ſhall not be intended, not being expreſsly pleaded. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

30. Aſſumpſit againſt adminiſtratrix of her huſband for 20 l. 10s. She *pleaded*, that he was bound *in a ſtatute to one C. for* 2000*l. pro vero & juſto debito minime ſoluto*. The plaintiff *replied that C. ſued out an extent and liberate upon the ſtatute, and had lands delivered to and accepted by him, and the return of the writ* prout patet per recordum. On general demurrer the plaintiff had judgment; for per Cur. C. *by accepting the lands upon the liberate, was concluded to have any other execution againſt the goods of the inteſtate*, and ſo the adminiſtratrix not chargeable upon the ſtatute; and judgment for the plaintiff. 3 Lev. 269. Paſch. 2 W. & M. in C. B. Barker v. Dye.

Ibid. ſaid per Cur. that this very point was reſolved lately in C. B. in caſe of JOHNSON v. YOUNG, by reaſon of the preſumption, that by the acceptance of the lands the ſtatute is ſatisfied.

31. Debt upon an obligation againſt an executor, who *pleads a recovery in debt and judgment, and that he had not aſſets ultra*, &c. *After a verdict it was moved* that this was no good plea, becauſe *for all that appears this recovery might be upon a debt for a ſimple contract*, for a plea ſhall always be preſumed ſtrongeſt againſt him that pleads it, and cites Plow. 46. 1 Inſt. 102. 3 H. 7. 2. and then, though a verdict be for the defendant, yet he ought not to have judgment, and cited NICHOLLS'S CASE, 5 Rep. Moor, 867. Hob. 112. But the *Court ſeemed to incline that it was well enough after a verdict, though perhaps upon demurrer it might have been bad*, according to 8 Rep. 133. TURNER'S CASE, for that caſe was not after a verdict, but upon a demurrer; though it was alleged by Goodfellow

Goodfellow to be after a verdict. Curia advisare vult. Freem. Rep. 215, 216. pl. 223. Mich. 1676. Read v. Dawson.

Freem. Rep. 44. pl. 54. Buckley v. Hoare, S.C. Atkins J. said, it will be a hard case for the plaintiff, for if the truth be that the statute is burnt, that yet it shall be in being to bar him of his debt upon the obligation, and yet he is intirely incapable of having any benefit by it, so that he should lose both his statute and the obligation too. But Vaughan Ch. J. said, that the inconvenience will be as great on the other side; for if the plaintiff should recover upon this obligation, perhaps he may be sued afterwards upon the statute, which for all that he knows may be in being. To which Atkins said, that then he should have traversed it, and then it might have been tried. Curia advisare vult.

32. *Debt upon bond of* 40*l.* against an administratrix, who *pleaded that the intestate was indebted to W. R. in* 250*l. on a statute merchant yet in force*, &c. *and that she had not above* 40*s. assets besides what will satisfy that statute.* The plaintiff *replied, that the statute was burnt* with fire; and upon a demurrer to this replication, and by the opinion of three justices, the plaintiff had judgment, because by the demurrer the defendant had confessed that the statute was burnt, and if so, then it could never rise up against him. But Vaughan Ch. J. differed in opinion, and said that it is a rule in law, that matter of record shall not be avoided by matter en pais, which rule is manifestly thwarted by this resolution, that it was a matter of record to both parties, and the plaintiff could not avoid it by such a plea, any more than the defendant could by any other matter of fact; and said * it was *a proper case for equity.* Mod. 186. pl. 18. Trin. 26 Car. 2. C. B. Buckley v. Howard.

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33. *Assumpsit* against an executor, who *pleaded a bond of* 40*l. entered into by his testator adhuc insolut', and no assets ultra* 5*l.* quæ non sufficiunt ad satisfaciend' debitum prædict' & ad illud onerat & obligat'. The plaintiff *replied, that the bond was conditioned to pay* 20*l. at a day yet to come*, and upon a demurrer judgment for the defendant, because the *plaintiff did not allege in his replication that the defendant had assets ultra to pay the* 20*l.* for if he has not, he is not bound to pay the plaintiff the debt upon contract before the debt upon bond due at a day yet to come. 3 Lev. 57. Trin. 34 Car. 2. C. B. Lemun v. Fooke.

34. Executor pleaded that his testator entered into a *bond to pay* 100*l. which was not yet paid, beyond which he has not assets*, and held good upon a special demurrer *without saying pro vero & justo debito.* Carth. 8 Trin. 3 Jac. 2. B. R. Luke v. Raw.

S. C. cited per Cur. Lutw. 450. Mich. 3 Jac. 2.

35. Debt upon bond against an executor, who *pleaded several judgments obtained against him upon bonds made by the testator, and that he had not assets ultra*, &c. The plaintiff *replied as to one bond of* 200*l. that the condition was to pay only* 100*l. and so to the rest severally, and that the defendant had assets to pay the plaintiff, and ultra to satisfy the said lesser sums in the conditions*, &c. viz. at such a place. The defendant *rejoins, that he had not assets ultra to satisfy the debts* and judgment in his plea. The plaintiff demurred specially, because this rejoinder did not answer the replication, but ambiguously; for he should have rejoined, that he had not assets ultra to satisfy the lesser sums, and not to make the pénal sums parcel of the issue, for if he had assets ultra the lesser sums he ought to pay the plaintiff; but resolved per tot. Cur. that the penalties are legal and due debts till the obligees are satisfied; for though in equity

equity and conſcience the leſſer ſums are only due, yet perhaps the obligees will not accept them without ſuit in equity; and *if they would or offer to accept them, and the defendant would not pay them, the plaintiff might help himſelf by pleading it ſpecially* that they would, and offered to accept the leſſer ſums, but that the defendant would not pay them, but kept the judgments on foot by fraud and covin, and give the ſame in evidence, but he cannot aid himſelf by ſuch a general pleading as this is in the principal caſe, and therefore judgment was given for the defendant. 3 Lev. 368. Trin. 5 W. & M. in C. B. Thompſon v. Hunt.

36. If an executor *pleads ſix judgments againſt him, ultra quæ he has not aſſets*, and he confeſſes by implication that he has aſſets ultra five, and if the plaintiff in his replication takes iſſue upon the riens ultra it is ill, and a man cannot oblige another to an iſſue of fact which he has confeſſed before; and *the better way is only to anſwer to ſuch judgments as he knows to be obtained per fraudem, and if any of them are found for the plaintiff he ſhall have judgment*, becauſe it would appear that the defendant has aſſets, he having confeſſed aſſets ultra five by his pleading ſix judgments. Ld. Raym. Rep. 263. Mich. 9 W. 3. Aſhton v. Sherman.

1 Salk. 298. pl. 10. S. C. adjudged accordingly; and that the plaintiff may reply ſeverally as to each, and that it is at his election to reply to all or ſome, or any one of the judgments ſet up by the executor. —— Carth. 229. S. C. adjudged againſt the plaintiff. —— 12 Mod. 153. S. C. held accordingly. —— Comb. 444. 449. S. C. and ſays the ſureſt way was for the plaintiff to anſwer to every particular; for though the replication to one be * falſe, yet if it is good for any of the reſt, the plaintiff ſhall recover; for the defendant ſhall not take advantage of his own wrong; and that the plaintiff having concluded with a quoad to every replication, is better than one concluſion only to all.

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37. *Debt* againſt an executrix, who *pleaded ſeveral actions of debt brought againſt her, pro eo videlt' quod cum the teſtator, &c. per quoddam ſcriptum ſuum obligatorium became bound*, &c. and that judgment was obtained againſt her, &c. and that ſhe had not aſſets ultra, &c. Exception was taken, becauſe it *was not expreſsly alleged that the teſtator was bound in the ſaid bond*. But all the Court held the plea good; and Holt and Powell ſaid, that none but the party himſelf, his heirs, executors or adminiſtrators, can plead non eſt factum. And per Powell J. the plaintiff cannot inſiſt upon any thing but the fraud. Lutw. 656. 662. Trin. 11 W. 3. Robinſon v. Corbett.

38. If executor pleads judgment which is *ill pleaded*, or on iſſue *found to be kept on foot by fraud*, he has confeſſed aſſets for it; per Holt Ch. J. 12 Mod. 527. Trin. 13 W. 3.

39. If on judgments pleaded *plaintiff prays judgment when aſſets come into his hands*, he ſhall not be chargeable till thoſe are paid; per Holt Ch. J. 12 Mod. 528. Trin. 13 W. 3. B. R. in caſe of Parker v. Atfield, cites Paſch. 23 Car. 2. Rot. 339. Walpole v. Prettiman.

40. To a *ſcire facias upon an interlocutory judgment* had againſt an executor, the defendant cannot plead a judgment in bar. 1 Salk. 315. pl. 23. Paſch. 3 Ann. B. R. Smith v. Harmon.

41. S. as *executor ſued a ſci. fa.* againſt the defendant, *ſetting forth that the inteſtate ſued the defendant in ſuch an action, and had judgment by nihil dicit, and a writ of inquiry of damages, which abated by his death*

6 Mod. 142. S. C. and per Holt Ch. J. the

ſtatute, viz. 8 & 9 W. 3. c. 6. has now eſtabliſhed the interlocutory judgment, and it was never the intent of it that the executor ſhould ſay more than the very party might have ſaid, and its meaning was to put the executor in the ſame

*death before the return of the writ, and that adminiſtration was granted to the plaintiff, and had ſci. fa. againſt the defendant, to ſhew cauſe why plaintiff ſhould not have judgment*, who *pleaded that the plaintiff ought not to recover, becauſe the defendant's teſtator was indebted to A. in* 100*l. upon bond, who obtained judgment againſt the ſaid teſtator, and that he had not aſſets ultra*, &c. The plaintiff demurred and had judgment, becauſe the ſtatute never intended that the executor ſhould make any other defence than what his teſtator might have done; and if a ſcire facias had been brought againſt his teſtator, he could have pleaded nothing but a releaſe, or other matter in bar ariſing puis darrein continuance. He is, by the words of the ſtatute, to ſhew cauſe why damages ſhall not be aſſeſſed and recovered, and if he appears at the return of the ſci. fa. and does not ſhew any matter ſufficient to arreſt the final judgment, then a writ of inquiry ſhall be awarded. 1 Salk. 315. pl. 23. Paſch. 3 Ann. B. R. Smith v. Harmon.

condition with the teſtator, and now he pleads in bar of the original action, which lies not in his mouth to do; and Powell agreeing put this caſe in account, viz. judgment is, quod defendens computet, a ſcire facias lay for the executor before this ſtatute, yet the party could plead nothing againſt the firſt judgment; and per Holt Ch. J. the ſci. fa. is not ſo good as it ſhould be; for it ſhould be ſci. fa. ad audiend' judicium, that is, giving them day to come and hear the judgment of the Court; and judgment was given for the plaintiff; and Holt Ch. J. ſaid that the executor could not plead a releaſe here though to himſelf, and therefore the not pleading it would not be a devaſtavit.

42. The plaintiff obtained an *interlocutory judgment* againſt the Ld. Mohun in an action upon the caſe. The Ld. Mohun died, and the *plaintiff took out a ſcire facias upon the 8 & 9 W. 3. cap. 10. againſt the defendant his executrix, and had an interlocutory judgment againſt her by default, and executed a writ of inquiry, and had final judgment againſt her de bonis teſtatoris, and* took the teſtator's goods
[ 261 ] in execution. The *Court was moved to ſet aſide the execution, and to order reſtitution of the goods for want of a ſcire facias quare executio non after final judgment*, and the caſe of Smith and Harman now reported in Salk. 315. and Mod. Caſes, 442. was cited, that upon a ſcire facias upon an interlocutory judgment, an executor cannot plead either a general or a ſpecial adminiſtravit, and therefore unleſs a ſci. fa. is to go out upon a final judgment in ſuch caſe, an executor will be in a worſe condition than if final judgment had been againſt the teſtator. The Court, upon hearing counſel on both ſides, denied the motion, becauſe by the ſaid ſtatute the executrix ſtands in the place of the teſtator, and can ſay nothing but what he might have ſaid if he had lived. Quære, if it be not a better reaſon becauſe executrix had, upon the ſcire facias being taken out, an opportunity to plead all ſuch matters as the law allowed in ſuch caſe. N. B. The judgment in the ſaid caſe of Smith v. Harman ſeems to be law, becauſe the *executor there was the original defendant, and had an opportunity to plead the bond in bar of the action, but inſtead thereof he let judgment go by nihil dicit*, or after the interlocutory judgment he might have pleaded that to the action upon the bond; but where an executor or adminiſtrator is not party to the original action, but brought in by ſuch ſcire facias, he ought (as it ſeems) to be admitted to plead a ſpecial adminiſtravit, as it is adjudged Salk. 296. he may do where final judgment

judgment is had againſt the teſtator, notwithſtanding the reported reaſons of the reſolution of the ſaid caſe of Smith and Harman; for the ſuit being continued by the ſaid ſtatute in the ſame ſtate it was in at the death of the teſtator, ſeems not to deprive the executor of any plea but ſuch as the teſtator might have had before his death. MS. Rep. Paſch. 12 Ann. C. B. Snape v. Lady Mohun.

## Executor. Adminiſtrator.

### (L. a) Who of them may retain.

[1. *A lawful* executor may retain the goods of the teſtator in ſatisfaction of a *debt* due to him by the teſtator.] D. 2. pl. 3. Mich. 6 H. 8. Longſtone v. Dyer, S. P. ——— And if he has no other goods he may plead plene adminiſtravit if debt be brought againſt him; per Hobart Ch. J. Winch, 19. Anon.

[2. So it ſeems that an *adminiſtrator* may retain to ſatisfy himſelf, becauſe he *comes in by an act of law*, ſcilicet, by the letters of the ordinary authoriſed by the ſtatute of 31 *E.* 3. Adjudged Mich. 14 Ja. B. * Sir Wm. Warner v. Wainford. H. 8 Ja. admitted per Cur. Burnett v. Dixe. Hil. 11 Ja. B. per Cur. † Bond v. Green.] * Hob. 127. pl. 160. S. C. and the plea of detainer by the adminiſtrator was by the better opinion of the Court thought ſufficient.

† Godb. 217. pl. 310. S. C. held per totam Curiam, but that executor de ſon tort cannot. ——— Brownl. 75. S. C.

[3. If A. be *indebted to B. and to C. by ſeveral bonds* and dies, and *D. takes adminiſtration*, and after *B. makes D. his executor* and dies, *D. may retain* goods which he has as adminiſtrator to A. to ſatisfy the debt due to him as *executor to B.* per Cur. H. 8 Ja. B. Burnet v. Dixe.] 2 Brownl. 50. Burdet v. Pix, S.C. as it ſeems, but ſomewhat differently ſtated.

‡ [262] [4. An *executor de ſon tort* cannot retain to ſatisfy himſelf, becauſe he *comes to it by his own act and tort*, and not by any ‡ courſe in law, and if he might retain, great inconvenience and confuſions would enſue. Reſolved, 5 Rep. 30. b. Coulter's case.] Cro. E. 630. pl. 36. Ireland v. Coulter, S.C. adjudged. ——

Mo. 527. pl. 606. S. C. adjudged by all the judges of England at Serjeant's Inn. ——S. P. by Frowike, Keilw. 59. a. Hill. 20 H. 7. ——Brownl. 103. Mich. 6 Jac. Alexander v. Lumb, S. P. accordingly. ——Yelv. 137. S. C. ——But Cro. E. 631. held obiter, that where one is made executor by a former teſtament, and afterwards another teſtament is made, and therein another made executor, and the laſt teſtament not being known, the firſt is proved, and the executor pays debts to himſelf, and then the ſecond teſtament is diſcovered and proved, yet peradventure the payment of the firſt executor's debts ſhall be allowed him againſt all ſtrangers at the leaſt; for he had colour to do it as executor by the firſt teſtament, and he is to be allowed for all judicial acts done by him, &c.

[5. It ſeems that the *ordinary* might *before the ſtatute of* 31 *E.* 3. retain to ſatisfy a debt due to himſelf, becauſe he had the power of adminiſtration caſt upon him by the law.]

[6. But it ſeems that *after the ſaid ſtatute* of 31 E. 3. that he cannot retain, ‖ becauſe now he ought de jure to grant adminiſtration, therefore they not granting, but the adminiſtration ‖ Fol. 923.

by himſelf is in a manner injurious, and therefore he cannot retain and ſo *take advantage of his own wrong.*]

Hob. 250. pl. 329. S. C. Mich. 18 Jac.—S. C. cited by Raymond J. Raym. 484.

[7. If *adminiſtratrix durante minore ætate* of an executor *makes divers bonds to the creditors of the teſtator*, and after *takes baron*, the baron may retain ſo much of the goods of the teſtator as amounts to the value of the debts ſecured by the obligations of the feme as his own goods. Hob. 327. per Cur. BRIERS v. GODDARD.

Hob. 250. pl. 329. S. C. and the ſame quære.

[8. Quære *if the feme dies whether the baron may detain after*, for then the baron is no longer chargeable by the obligations. Hob. Rep. pl. 327. it ſeems if baron *in life of his wife declares that he retains* ſuch particular goods in lieu of the obligations, though the wife after dies, yet by the declaration the *property was abſolutely altered* in the baron, and then the death of the wife after will not deveſt it.]

[9. If *two executors* are, and *one pays the debts* of the teſtator *with his own money*, he may retain ſo much of the goods of the teſtator againſt his companion. 37 H. 6. 30. 20 H. 7. 5. b.]

S. P. by Rede J. and agreed by the others. Keilw. 63. a. Trin. 20 H. 7. that he may retain.

[10. So if the *teſtator was indebted to one executor*, he may retain to ſatisfy himſelf againſt his companion. 37 H. 6. 30. Contra 20 H. 7. 5.]

S. P. by Hale Ch J. Vent. 199. Paſch. 24 Car. in B. R. in caſe of Edgecomb v. Dee.

[11. An executor may retain *a debt* due to himſelf by the teſtator *upon a contract*; for though no action of debt lies againſt an executor upon a contract, yet this is a duty, and if he pleads to it, and does not take advantage of it, it ſhall bind him. And alſo an action upon the caſe lies upon ſuch contract againſt an executor. Mich. 1649. adjudged per Cur. upon demurrer. SLEDDAL v. BOWERBANK. Intratur T. 1649. Rot. 918.]

Sty. 337, 338. S. C. adjudged.—S. C. cited 2 Vent. 180.—2 Show. 373. Arg. cites S. C.

[12. If an *action* be brought *upon a contract againſt J. S. as executor to B.* (where he is executor *de ſon tort*) and *pending the ſuit* upon continuances, *adminiſtration* of the goods of B. *is granted to J. S.* he may retain in this caſe goods to ſatisfy an obligation in which B. was bound to him; becauſe debts upon ſpecialty ought to be firſt ſatisfied, and now he is made lawfully adminiſtrator, and cannot ſue himſelf. Tr. 1652. adjudged upon demurrer. WILLIAMSON v. NORWICH. Intratur Hil. 1651. Rot. 1667.]

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13. If *debtee of teſtator be debtor to the executor* in a like ſum, and the executor, in ſatisfaction of teſtator's debt, *releaſes his debt*, the property ſhall be altered preſently of the whole goods in the hands of the executor; ſo where a debtor makes *the creditor executor*; per Anderſon Ch. J. Le. 112. pl. 153. Paſch. 30 Eliz. C. B. in caſe of Stamp v. Hutchins.

14. Two are jointly bound in a *bond*, one as principal, and the other as *ſurety*. The principal died, and the ſurety adminiſtered. The bond being forfeited, the ſurety agreed with the creditor and diſcharged the debt. Another *creditor brought debt*. Adjudged, he cannot retain; for by joining in the bond with the principal, it became

became his own debt. Godb. 149. pl. 194. Mich. 5 Jac. B. R. Anon.

15. The husband on marriage gives *bond to truſtees to pay* 3000*l.* *to the wife* (not to the truſtees) if the ſurvives him. The husband dies, leaving a daughter and the wife living. The wife adminiſters durante minore ætate of the daughter. Per Raymond J. ſhe may retain; but if the payment was to have been made to the truſtees, ſhe could not. Raym. 483, 484. Hill. 34 & 35 Car. 2. B. R. Roſkelly v. Godolphin.

Skinn. 214. Roſkellet v. Godolphin. S. C. adjudged. —— 2 Show. 403. Rockelley v. Godolphin, pl. 375.

S. C. adjornatur, but all the Court except Holloway J. inclined for the retainer.

16. Action was brought againſt A. *as executor of an executor of an executor*, againſt whom the plaintiff had recovered a judgment in debt, the executor had waſted, and was *indebted upon ſimple contract to the defendant*, whom he made his executor. Per Cur. the defendant may retain for his debt grounded on the devaſtavit; for it ſhall not be adjudged a debt ſuperior to a ſimple contract. 2 Vent. 40. Mich. 2 Jac. 2. C. B. Bathurſt's caſe.

17. An *executor of an executor* may retain, but then he muſt be executor of the firſt teſtator, which an *executor of one of the executors of teſtator, the other executor being ſtill living*, is not, and therefore cannot retain. Per Ld. Wright. Ch. Prec. 180. Mich. 1700. Hopton v. Dryden.

18. *A. dies indebted by one bond to B. and by another bond to C. and leaves B. and J. S. executors; B. intermeddles with the goods, and dies before probate, and before any election made to retain*; quære, whether, as B. might have retained the goods in his hands, his executors have not the ſame power. 3 Wms.'s Rep. 183. Paſch. 1733. Croſt v. Pyke.

## (M. a) Executor. Adminiſtrator.

### In what Caſes they may retain.

Fol. 923.

* [264]

[1. IF teſtator gives a cup of gold in pledge for 20*l.* and executor of his proper goods *redeems the pledge*, he may retain the pledge as his proper goods. 20 H. 7. 2. b. 4, 5.]

S. C. per Frowike Ch. J. Contra per Kingſmill, Vaviſor, and Fiſher Juſtices. For the executor has done that which the law would not charge him with, as to pay a ſimple contract, &c. and therefore this remains as aſſets. Br. Adminiſtrator, pl. 51. cites 20 H. 7. 2. Br. Aſſets enter mains, pl. 12. cites S. C. ——— Br. Executor, pl. 170. cites S. C. and ſays that in the ſame year, fol. 4. by the opinion of all the juſtices except Kingſmill, the property is changed to the executor; and the pledge ſhall not remain in their hands as aſſets. ——— D. 2. b. pl. 6. Paſch. Mich. 6 H. 8. S. P. ——— In debt againſt the executors of R. at the iſſue, upon fully adminiſtered, pleaded, &c. the plaintiff gave evidence, that they had goods, plate, &c. in their hands; the defendant pleaded, that they redeemed part of them with their own money, which goods were pledged by the teſtator to the full value; and for the reſidue that they had paid for the debt of the teſtator ſo much to the full value, or more. And upon demurrer it was adjudged good evidence for the executors to maintain the iſſue; for a man ſhall have recompence for that which he hath lawfully paid; as a diſſeiſor paying rent it ſhall be recouped in damages. And it is not like the caſe, where the teſtator devices that his executors ſhall ſell his land, for in that caſe they may not retain it, becauſe it is the will of the teſtator that they ſhall ſell. Dy. 2. pl. 3. Mich. 6 H. 8.

If A. being poſſeſſed of a leaſe for 60 years of 100*l.* land, mortgages this for 500*l.* or be it that the mortgage or pledge of a jewel or piece of plate for half the value, and before the day limited for payment

ment and redemption, A. having made B. his executor dieth; and B. maketh payment at the day. Now, this leaſe, plate, or jewel is in B. as executor to A. and is ſubject to the payment of debts and legacies; but if the payment be after the day, the property or intereſt is in the executor to his own uſe. This is rather a re emption than a redemption, and if the executor make the redemption by payment at the day with the teſtator's own money or goods, the thing redeemed is in him as executor, and the money by him paid for redemption is well adminiſtered, the goods redeemed being of better value; and there is no difference whether the whole value of the goods be deemed aſſets, and the money paid for redemption ſtand drowned therein, or that the ſum be ſtill adjudged in the hands of the executor as aſſets, and only the ſurpluſage of the thing redeemed over and above the ſum paid for redemption. Went. Off. Ex. 77. to the middle of 81.

The ſame of a term. Mo. 2. Shelly v. Sackwill.—

[2. If the executors *pay debts* of the teſtator *out of their own proper goods*, they may retain ſo much in value of the goods of the teſtator, as their proper goods. 20 H. 7. 2. b. 5.]

And. 24. S. C.——But unleſs executor has in his hands money of the teſtator's (it being eaſy to make of that a proportionable change), or unleſs the ſum paid by him for the teſtator, or owing to him by the teſtator, amount to the full value of all the teſtator's goods in his hands, or exceed the ſame, no alteration can be till ſome election or declaration made by the executor, which of the goods not exceeding the value, he will have to be his own. Went. Off. Ex. 89.——But if the election or declaration exceed the debt, it may perhaps be void. Ibid. 90.——If executor pays 20 s. of his own money for the teſtator, and retains a horſe of the ſame value, this is a good adminiſtration, and changes the property if it be by licence of the ordinary. Br. Adminiſtrator, pl. 37. cites 21 E. 4. 21. Per Choke. But ſays quære, for the reporter doubted.——Br. Executors, pl. 116. cites S. C. accordingly, that he may well do it by the licence of the ordinary, which ſtands with conſcience and the law, and by this may plead plene adminiſtravit. But the reporter doubted, and thought that it does not change the property; for a man cannot give to himſelf; and the ordinary has no property in it.——But the executor cannot retain ut ſupra without licence of the ordinary. Ibid.

If executors retain goods to the value of 10 l. and pay 10 l. de propriis, this ſhall not change the firſt goods of the teſtator. Br. Property, pl. 50. cites 21 E. 4. 21.——But ſhall remain in his hands as aſſets, and ſhall charge him. Br. Executor, pl. 6. cites S. C.

[3. If a man be indebted to the teſtator, and the *executors have not any goods in their hands by which they bring debt againſt the debtor and recover*, where the *coſts amount to the value* of the debt recovered, in this caſe they ſhall retain as their own goods. 20 H. 7. 4. b.]

4. Reſolved, that if an *executor with his own proper monies pay a debt due by the teſtator*, he may retain ſo much of the value of the teſtator in his hands. Mo. 2. pl. 3. Hill. 10 H. 8. 7. Cleydon v. Spenſer.

5. Executor cannot retain goods *for part of the debt, and have action againſt the heir for the reſidue*; for he cannot apportion his debt, but muſt retain goods for the whole, or have the whole againſt the heir. Arg. Pl. C. 185. b. Trin. 5 Mar. 1. in caſe of Woodward v. Darcy.

6. If the executor be *taken in execution for the debt of the teſtator*, he may retain ſo much of the goods of teſtator, and it ſhall be accounted aſſets in his hands; per Periam J. Le. 112. pl. 153. Paſch. 30 Eliz. C. B. in caſe of Stamp v. Hutchins.

D. 2. pl. 3. a. Marg. cites S.C.— Cro. E. 120. pl. 10. S.C. held accordingly.

7. Executor *takes in a bond, and gives another in his own name* for the ſame ſum; he may retain. Mo. 260. pl. 409. Paſch. 30 Eliz. Stamp v. Hutchins.

——S. P. But if he compounds for leſs, the ſurpluſage ſhall be aſſets. Goldſb. 79. pl. 15. Hill. 30 Eliz. Anon.——But per Anderſon, it is otherwiſe of a promiſe. For the bond debt is not thereby diſcharged. Ibid.

8. Executors

8. Executors *appointed to ſell land* cannot retain this land and pay ſo much as it is worth, and as much as teſtator appointed upon the ſale. For it is both againſt the words of the will, and the intention of the teſtator. Jenk. 189. pl. 88.

For their authority is only to ſell the land. But in the caſe Kelw. 58. b.

of goods the executors have an intereſt. Per Frowike.

9. A. is a principal, and B. is ſurety in a bond. A dies, B. takes adminiſtration, the bond is forfeited; B. gives the creditors a bond in diſcharge of the debt. He cannot plead plene adminiſtravit, and by ſhewing this matter be relieved, becauſe by *joining with the principal the debt became his own debt.* 4 Le. 236. pl. 373. Mich. 5 Jac. C. B.

10. *Two* men *were bound jointly* in a bond, *one as principal and the other as ſurety;* the *principal died inteſtate*, the *ſurety took adminiſtration* of his goods; and the principal having forfeited the bond, the ſurety made agreement with the creditor, and took upon him to diſcharge the debt; in debt brought by another creditor, the queſtion was upon fully adminiſtered pleaded by the adminiſtrator, if by ſhewing of the bond, and that he had contented it with his own proper money, whether he might retain ſo much of the inteſtate's eſtate; and it was adjudged that he might not; for Fleming Ch. J. ſaid, that by joining in the bond with the principal, it became his own debt. Godb. 149. pl. 194. Mich. 5 Jac. in C. B. Anon.

11. It has been adjudged that executor may retain for a debt due to him from teſtator *on a ſimple contract;* per Hale, Vent. 199. Paſch. 24 Car. 2. B. R. in caſe of Seaman v. Dee.

12. *So far as the perſonal eſtate goes, the adminiſtrator may prefer himſelf, but no further;* afterwards they can only ſhare with the other creditors, &c. 2 Chan. Caſes, 55. Trin. 33 Car. 2. Gell v. Aderley.

13. B. was bound as *ſurety for A.* to C. and for B.'s indemnification *A. aſſigned to B. a term* for years and dies, and *made B. executor;* J. S. was a creditor to B. by ſimple contract, and there being no perſonal aſſets left, A. having applied all them to the payment of his own debt, J. S. would have the benefit of the term for payment of his debt, ſed non allocatur, for that the executor may apply the perſonal aſſets one way or other. 2 Vern. 36. pl. 29. Hill. 1688. Sprignel v. Delawne.

14. If an action be brought againſt a *ſpecial adminiſtrator* and the adminiſtration determines pending the *action*, he ought to retain aſſets to ſatisfy the debt which is attached on him by the action; per Holt. Comb. 465. Hill. 10 W. 3. B. R. Sparks v. Crofts.

Carth. 432. S. C. but S. P. does not appear. —— Ld. Raym. Rep. 265. S. C. but S. P. does not appear.

15. Adminiſtrator may retain a bond debt *againſt rent*, but he cannot plead a bond debt due to another. 1 Salk. 326. Hill. 11 W. 3. B. R. Per Curiam in caſe of Gage or Gray v. Acton.

It was agreed that both in law and equity an executor may retain for his whole debt when *in equal degree*. Wms.'s Rep. 226. Mich. 1715. Waring v. Danvers.

16. A court of equity *will never assist* a retainer, and if there are equitable assets only, the executor ought not to retain to pay all but only a proportionable part. Per Ld. Wright, Ch. Prec. 181. Mich. 1700. Hopton v. Dryden.

17. If administration be granted to a *creditor*, and after *repealed* at the suit of the next of kin, he shall retain against the rightful administrator. 1 Salk. 38. pl. 6. Pasch. 13 W. 3. B. R. Per Holt Ch. J. in case of Blackborough v. Davis.

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18. A. before marriage gave a *bond to a trustee for his wife to leave her* 100*l. if she survived him, and after was indebted by bond to B. in* 120*l.* A. died and made his wife, who survived him, executrix; it was objected that the executrix cannot retain the 100 l. though she might give judgment to her trustee on this bond, but that the *right of retainer is where the executrix cannot sue, and therefore for necessity shall retain*, and that the debts shall be paid in average, as had been often decreed by the Master of the Rolls; but Ld. C. King held, that though in strictness of law the executrix cannot retain in this case, yet since it would be a vain thing for her to pay the 100 l. to her own trustee with one hand and take it back with the other, there this bond in equity should be the same as if made to herself. Trin. 1725. 2 Wms.'s Rep. 298. Cockroft v. Black.

The reporter at the end of the page adds a quære; for in the case of Hill v. Underwood, Trin. term 1739, Ld. Chancellor seemed not satisfied with this resolution.

## (M. a. 2) Pleadings in Retainer.

1. IN *debt by A. against B. executor of C.* he *pleaded plene administravit*, and *in evidence A. shewed that B. had a farm of C. in his hands of the value of* 200 *marks; the defendant shewed how he had expended* 200 *marks for the debts of testator.* Upon consultation with the justices of B. R. this was admitted for evidence in maintenance of the issue of fully administered; for it is tantamount. Mo. 2. pl. 3. cites 6 E. 6. Shelly v. Sackville.

And. 24. pl. 50. S. C. according.—Bendl. 11. pl. 8. S. C. cited, mentions the point stated to the justices of B. R. for their opinion, viz. Whether this is good evidence for the defendant without having pleaded this matter by way of bar (who answered that it was * not; by which they proceeded further in the matter. —— [* Quære, if the word (not) should not be omitted?]

2. A. was indebted by bond to B. in 20l. and to C. in 60 l. A. *makes D. his executor* and dies. C. makes D. his executor also and dies; D. may retain against B. for the 60 l. but then he *must plead* as of his *election made before the action brought by B.* 2 Brownl. 50. Hill. 8 Jac. C. B. Burdett v. Pix.

3. An action of debt brought against an *administrator*, who *pleads that the intestate was indebted to him by obligation, and that he retained the money* in his hands *to satisfy the debt.* The plaintiff *replies that the money was not due and payable to him at the time of the intestate's death; and that he took administration after the day of payment*; and if the administrator had pleased, he might have took administration before the day of payment; and the Court held the defendant's

fendant's plea good, but he ſhall not have the forfeiture. Brownl. 73. Paſch. 12 Jac. Grove v. Jourdain.

4. Adminiſtrator defendant may give retainer *in evidence or plead it* at his liberty. Brownl. 75. Bond v. Green.

5. On pleading, plaintiff demurred becauſe it did *not appear that adminiſtration was committed to the defendant*, and ſo had no colour to retain; adjudged for the plaintiff, for the plea is inſufficient. 2 Jo. 23. in C. B. Calverly v. Elliſon.

6. In debt againſt an *executor he pleaded, that the teſtator was indebted to him on bond conditioned to pay rent, and that at the time of his deceaſe there was* 300*l. due* for rent, *and that he had no more than* 60*l. aſſets to pay it*; the plaintiff *replied, that at the* time *of the teſtator's death there was but* 30*l. due for rent.* The Court held this a good replication, though the penalty of the bond was forfeited at the time of the teſtator's death. Vent. 354. Paſch. 35 Car. 2. [267] B. R. Page v. Denton. For if a bond due to a ſtranger is forfeited, and this is pleaded by an executor, and that he hath not aſſets ultra, it is a good replication to ſay that the obligee would have taken part of his money in full, and it ſhall be a bar for no more; and in the caſe above the defendant ought to take only his own due debt. And the Court ſaid that if men would plead their cauſe ſpecially, it would ſave many a ſuit in Chancery. Ibid.

## (N. a) The Power of an Executor.

## [Or; The Power of a Feme Executrix.]

[1. A *Feme executrix cannot give the goods* of the teſtator *in pios uſus* without the aſſent of the baron. 18 H. 6. 4.]

[2. A *feme cannot make acquittance* or releaſe without her baron. 27 E. 3. 82. b. admitted by iſſue. Contra, 8 H. 6. 4. b.] Fol. 922.

Br. Executor, pl. 153. cites 16 H. 6. Contra, that the releaſe of a feme covert executrix is a good bar; ſo of an *infant* executor. But Brook ſays, *quære* of a feme covert.

3. *Before entry* executor may *alien a term*; Arg. Pl. C. 520. b. Hill. 20 Eliz. in the caſe of Welden v. Elkington.

4. Executors may *juſtify the entry into the houſe of their teſtator* upon the heir or ſucceſſor to take the goods of their teſtator *if the doors are open.* Br. Executor, pl. 129. cites 21 H. 6. 30.

4. If *adminiſtrator on condition* before the condition broken *gives the goods* of the inteſtate, and after the condition is broken, yet the gift ſtands good. 6 Rep. 19. in Packman's caſe, cites Dy. 339. 17 Eliz. and 34 H. 6. 14. a. b.

S. C. cited Arg. Show. 411. that if he ſells the goods of the inteſtate, yet the ſale ſtands good.

5. If executor *will not ſell* teſtator's goods *at the value, or ſell under the value*, he ſhall be charged, and the party ſhall demand the debt againſt him with an averment; but if upon a *recovery*

againſt executor the plaintiff has a fi. fa. to the ſheriff of teſtator's goods, and they pro defectu emptorum remanent, &c. and a *venditioni exponas* is awarded, and the ſheriff ſells them under the value, the party has no remedy unleſs he does it by *covin*; per Frowike Ch. J. Keilw. 64. b. Trin. 29 H. 8.

3 Le. 200. Arg. in the caſe of Paramour v. Robinſon. ——Fin. Law, 8vo. 168. ——Roll. Rep. Arg. 140. 143. per Doderidge, cites Pl. C. Grantham's caſe, ſupra.

6. Executor *cannot deviſe the goods of the firſt teſtator*, becauſe his executor has it by title before the deviſe ſucceeded as executor immediate to the firſt teſtator. Pl. C. 526. a. Trin. 19 Eliz. Branſley v. Grantham.

Cro. E. 459. pl. 5. Hill. 38 Eliz. Wilſon v. Packman, S. C.—— For ſince the ſtatute of 31 Ed. 3. the adminiſtrator has as abſolute a property in the goods as an executor who is in by the very will of the teſtator. Per Holt Ch. J. 12 Mod. 617. in caſe of Blackborough v. Davis.

7. Adminiſtrator has the abſolute property of the goods in him, and may *give the goods* to whom he will, and though the adminiſtration is afterwards *revoked by citation* (but if on appeal it is otherwiſe), yet the gift is not defeated; but if the gift be by *covin*, this ſhall be void * by 13 *Eliz.* 5. againſt a *creditor*, but it is good againſt the ſecond adminiſtrator. 6 Rep. 18. b. Hill. 37 Eliz. B. R. Packman's caſe.

* [ 268 ]

8. Executor *of leſſee for life of a houſe* has no intereſt in the houſe, but only *a licence in law* to enter and take away the goods. Yelv. 124. Hill. 5 Jac. B. R. in caſe of Sandford v. Sutcliffe.

9. Teſtator *bequeathed a debt*, which J. S. owed him, *to B.* and *C. executors*. C. proved the will, and *releaſed to J. S.* the debt. B. brought his bill, to which the releaſe was pleaded, which was allowed, and the bill diſmiſſed. Nelſ. Chan. Rep. 56. anno 1649. Matthews v. Thomas.

And per Keeling J. he cannot ſo waive it but that he ſhall be charged in the detinet upon which the aſſets ſhall come in queſtion; and Twiſden agreed. Ibid. —— Sid. 240. pl. 12. and Ibid. 266. pl. 17. S. C. adjudged, and contra to the caſe of Overton v. Sidhall, as reported in Walker's caſe, 3 Rep. 24.

10. An executor cannot *waive a term*, but he ſhall be charged for the rent if he has aſſets; for he is obliged to perform all contracts of the teſtator if he has aſſets, be the rent high or low. 1 Lev. 127. Hill. 15 & 16 Car. 2. B. R. Hellier v. Caſebert.

An executor that intermeddles cannot waive a leaſe or any other part of the teſtator's eſtate, for he cannot aſſume the executorſhip for part and refuſe for part; but in caſe the land is not of more worth than the rent, it is a good plea to an action of debt in the debet and detinet, for he is to be charged in the detinet only; though when the rent is of leſs value he may be charged in the debet and detinet for what is accrued in his own time, according to Hargrave's caſe. 5 Rep. Vent. 271. Trin 27 Car. 2. B. R. Bolton v. Cannon.——Freem. Rep. 394. pl. 510. S. C. it ſeemed per Cur. that an executor could not waive his term; for if he had aſſets he ſhould be charged de bonis teſtatoris, and the profits of the lands are only aſſets to the rent, and only the ſurplus above the rent is aſſets to other debts.

11. A. deviſed 1000l. to be *laid out in a purchaſe of lands, or otherwiſe to the beſt advantage*, and the intereſt thereof to be paid to B. till a good purchaſe of ſome good leaſe, annuity, or rent-charge, ſhould be made therewith for B. during his life, but if he died before ſuch purchaſe, then 500l. to C. and 500l. to D. On bill for her 500l. defendant pretends the money was all *ſpent at law* for B. whilſt he lived and was under his care, and otherwiſe for his

his benefit. Decreed the 500 l. and damages ſince the bill to D. for that the defendant could not lay out the money in any other manner than ſuch as was *directed by the will.* Fin. Rep. 250. Paſch. 28 Car. 2. Corbet v. Franklin.

12. Monies due on a contract for land are ſecured by bond. Vendor dies, and leaves *three executors in truſt*, and *one of them delivers up the bond, and takes a new one* in his own name, and the name of his co-executors, *and releaſes the articles*, by which means 500*l. intereſt was loſt to the infant for whom the truſt was.* Fin. C. decreed the payment to be made according to the times of payment in the firſt articles, and the ſaid executor and the vendee to be charged therewith notwithſtanding the releaſe. 2 Chan. Caſes, 235. Mich. 29 Car. 2. Hilliard v. George.

13. A. deviſed a *term to his executrix for life*, and after *to his daughters.* The executrix *aſſented* to the legacy, and *aſſigned* the term, though there was not want of aſſets, and died. Decreed the term to the daughters. Fin. Rep. 378. Trin. 30 Car. 2. Tomlinſon v. Smith.

14. A. deviſed lands to B. *to pay mortgages firſt and then legacies*, and makes B. executor. *Executor mortgaged* the lands *to raiſe money to pay other debts of A.* Though debts are not directed to be paid by the will, but only mortgages and legacies, yet ſuch new mortgages ſhall take place of the legacies; per Finch C. Vern. 69. pl. 65. Mich. 1682. Brent v. Beſt & al'. [ 269 ]

15. Some debts owing are *within the ſtatute of limitations*, and the executor *refuſes to plead the ſtatute.* Ld. Sommers denied to give leave to the reſiduary legatee to make defence inſtead of the executor, and ſo enable him to bar ſuch creditors by pleading the ſtatute. Chan. Prec. 100. pl. 88. Mich. 1699. Ld. Caſtleton v. Fanſhaw.

Equity will not compel the executor to plead the ſtatute in ſuch caſe. Eqa. Abr. 305. S. C.

16. Upon the death of a termor, *reverſioner entered, and died ſeiſed.* Afterwards adminiſtration de bonis non is granted. Per Cur. the *term* had an exiſtence as ſoon as the adminiſtration was granted, and the adminiſtrator may have a ſpecial action of treſpaſs, ſo *his entry not tolled.* 5 Mod. 384. Hill. 9 W. 3. B. R. Trevillian v. Andrew.

17. The executor has ſuch immediate poſſeſſion of *goods at a diſtance*, of the teſtator's, that he may maintain *trover* for them in his own name againſt any converter of them, and the damages recovered ſhall be aſſets in his hands. 6 Mod. 181. Paſch. 3 Ann. B. R. in caſe of Jenkins v. Plume.

18. As an executor may ſell, ſo *he may mortgage*, and the *purchaſor is not concerned to ſee the eſtate cleared*, though it was once held otherwiſe in caſe of a ſpecific legacy in the Houſe of Lords, which he ſaid was an hard caſe, and hoped would never happen again; but if it did, he did not know how far that would be a precedent, but he would not allow it in any other caſe; per the Maſter of the Rolls. Trin. Vac. 5 Geo. 1719.

19. Executor *is* no more than *a truſtee* made by the teſtator, and has not the ſame right to the perſonal eſtate, as the heir has

to the lands; for the heir is to ſit in the ſeat of his anceſtors; per Cur. 8 Mod. 126. Paſch. 9 Geo. in caſe of Goodright v. Opie.

## (N. a. 2) Power to prefer one Creditor to another, or pay his own Debt firſt.

1. IF all the *goods are but* 20*l.* and *debts are due to two by obligation, each of* 20*l.* the executor may pay which of them two he will. Br. Executor, pl. 172. cites Dr. and Stud. fo. 76. cap. 10.

2. Where an action is brought againſt an executor for a juſt debt, *if the plaintiff fears he will confeſs a judgment to another, to defeat him* of his ſaid debt, *he may move the Court, that the defendant may plead to his action in the ſame term,* in which the plaintiff declared againſt him, *and not* be ſuffered *to gain time by an imparlance;* per tot. Cur. 1 Bulſt. 122, 123. Paſch. 9 Jac. Anon.

3. *Verbal demand* of a debt from the executor by one creditor, where there are other creditors in equal degree, takes not away the executor's power of preference, where the debts are all preſently due. Went. Off. Ex. 143, 144.

4. An *action was brought againſt an executor,* and *pending that action, he procured another to commence an action againſt him for a juſt debt due* and owing by his teſtator; and the *executor gave way to the plaintiff in the laſt action, to obtain judgment before the other,*
[ 270 ] which judgment he pleaded to the firſt action, and adjudged good, becauſe he has liberty to pay one debt before another; for though in conſcience all his teſtator's debts ought to be paid, yet there may be ſome circumſtances which may make it reaſonable to prefer one creditor before another; as if one lends money without uſury, and the other with uſury; or if the debtee is very poor, and in ſuch caſe where the executor conſents to pay him firſt, it ſhall never be intended to be by covin. Sid. 21. pl. 3. Hill. 12 Car. 2. C. B. Blundevill v. Loverdall.

5. An executor or adminiſtrator *may in many caſes ſuffer a judgment where he might have avoided it,* and yet the creditors without remedy; *as if debt upon a ſimple contract be brought againſt* an adminiſtrator or executor, *and he ſuffer judgment againſt him,* this judgment may be pleaded to other creditors; and that hath been ſo ruled in B. R. which was admitted by Pemberton. Freem. Rep. 256. pl. 271. Trin. 1678. C. B. per Cur. in caſe of Drake v. Randall.

But this decree was afterwards reverſed in the Houſe of Lords. 2 Vern. 445. in S. C.

6. The executor of a teſtamentary eſtate has the power over it ſo as to alien or ſell, as he ſhall judge neceſſary; and if it be ſold *in prejudice of a ſpecific or reſiduary legatee,* they may have their remedy againſt the executor, but not *follow the eſtate* in the hands of a purchaſor. 2 Vern. 445. Mich. 1703. in caſe of Humble v. Bill.

——The Maſter of the Rolls cited S. C. but ſaid that he took it to have been ſince reſolved, and that with great

great reaſon, that the executor, where there are debts, may ſell a term deviſed to another, and the deviſee has no other remedy but againſt the executor to recover the value if there are ſufficient aſſets to pay debts; but he admitted, if an executor ſhould ſell for an under value, or to one who has notice that there are not debts, or that all are paid, this might be another conſideration, but it not being ſo in the preſent caſe he diſmiſſed the bill. 2 Wms.'s Rep. 148. Trin. 1723. EWER v. CORBET, where the caſe was, that a termor deviſed his term to J. S. and made B. executor; and A. dying indebted, B. ſold the term, and his honour ſaid, that notice of the deviſe of the term was nothing; for the very naming him executor gives notice, ſo that if notice were any hinderance no executor could ſell; and to put a purchaſor of a term to take account of debts is not reaſonable, and would lay an embargo upon all perſonal eſtates in the hands of executors and adminiſtrators, which would be attended with great inconveniences, unleſs there is ſome particular truſt or a fraud in the caſe, it is impoſſible to ſay, but the ſale of the perſonal eſtate when made by an executor muſt ſtand, and that the creditors cannot afterwards break in upon it. Per the Maſter of the Rolls. Barn. Chan. Rep. 81. Paſch. 1740. Elliot v. Merryman.

7. The law gives an executor, being a creditor, a preference, and not only ſo, but the law allows this executor to give any * other creditor in *equal degree* a preference. Per Parker C. 10 Mod. 496. Paſch. 8 Geo. in Canc. in caſe of Cock and Goodfellow.

So in ſuch caſe the debt of the executor muſt be in equal degree with

the debts of others, and then he may prefer himſelf according to the rule of in æquali jure melior eſt conditio poſſidentis. Went. Off. Ex. 142.

* Went. Off. Ex. 142. S. P. But if the debt of the one be payable at a future day, and of the other preſently, the executor cannot prefer ſuch future debt, and pay it before the day of payment comes, and leave the other unpaid. But after the day happens he may prefer either unleſs in caſe of a ſuit commenced before the day, and he even thinks that a bare demand of the executor before the other debt becomes payable, prevents the preference, though contrary to Dr. and Stud. but ſays he lays it not down peremptorily.

8. *But* true it is, that *Chancery will ſometimes interpoſe*, becauſe theſe powers may be an inlet to *fraud*. Ut ſupra.

9. But it will *never take from the executor himſelf* this preference which the law gives him. Per Parker C. Ut ſupra.

10. A. a freeman of London, *poſſeſſed of ſeveral leaſehold houſes, and other perſonal eſtate*, by will *deviſed one third of all his perſonal eſtate to his wife; another third to his children, and his own teſtamentary third to his wife for life; remainder to ſuch of his children as ſhould be living at his wife's death*; and having *made his wife executrix*, appointed J. S. overſeer of his will, giving him 10l. for his care in ſeeing the will performed. She *ſold all the leaſes to J. S. the overſeer of the will*. The wife died, and the ſurviving child would have ſet aſide this ſale as purchaſed by one privy to the will [ 271 ] and eſtate, and in breach of truſt, and would have diſtinguiſhed this from the caſe of EWER v. CORBET; but the Court ſaid, that this was not ſo ſtrong as that, becauſe here nothing ſpecific, nor any particular leaſe, was deviſed to the children, as in that caſe, but only a third part of his perſonal eſtate in general. Per the Maſter of the Rolls. 2 Wms.'s Rep. 150. Trin. 1723. Burting v. Stonard.

11. A *bond was put in ſuit* againſt an *executor* who *pleaded plene adminiſtravit, that he was a bond creditor himſelf, and had paid himſelf*; on the trial it *appeared there was an interlineation of* 50*l. after the bond was executed*; ſo at law the bond was intirely void. Now application was made, that though the bond be void at law, that it may be conſidered as good in equity for what it was really given. Ld. Chancellor ſaid, that this at moſt can be a charge by ſimple contract; for you yourſelves have deſtroyed its being as a bond,

bond, ſo it is as if it never had been; and ſo can be no bar to the payment of a debt of a ſuperior nature. Caſes in Canc. in Ld. King's Time, 24. Trin. 11 Geo. Anon.

## (O. a) The Power of Executors, &c. among themſelves.

Mo. 350. pl. 470. S. C. the one executor ſold it to one, and the other executor ſold it to another, and adjudged that the executors did not take as deviſees, and ſo to have moieties, but that they took the term as executors, though as to freehold land deviſed to them by the ſame will they took that as executors. ——Cro. E. 347. pl. 19. S. C. held that the executors took not the term as a legacy but as executors.

[1. IF *two have leaſe for years as executors, and one aliens the whole*, this ſhall bind the other, and all ſhall paſs; for each has the intire * power to diſpoſe of all, both being in poſſeſſion in right of the teſtator. 37 Eliz. B. R. agreed and adjudged. PANNEL AGAINST FENN.]

[2. *Rot. Parliamenti*, 43 *E.* 3. *N°* 22. the Commons pray that where a man makes ſeveral executors, and dies, and *one of the executors refuſes the adminiſtration*, that acquittances made by him who refuſed adminiſtration be not prejudicial to them who accepted adminiſtration, but ſuch acquittances be void.]

ANSWER.

[3. Let the law before this time uſed upon this point be held and kept.]

Two executors have a term.

4. *Surrender of a term* by one executor is good for all. D. 23. b. Marg. pl. 146. cites 21 H. 7. 25. b.

One grants to a ſtranger all that which to him belongs The Court ſeemed that the whole term paſſes, becauſe each of them has the entire authority and intereſt in the term as executor; though of other jointenants it is otherwiſe. D. 23. b. pl. 146. Mich. 28 H. 8. Anon.

S. P. per Hyde Ch. J. and ſaid it was a good cauſe of equity againſt him that releaſed. ——Godb. 431, 432. pl. 496. Paſch. 3 Car. ——But by Jones J. there is no remedy for the other at the common law. Ibid. 432. ——Per Hern, all ſhall be bound by it. Goldſb. 141. in pl. 54. ——A. takes goods out of the poſſeſſion of one executor, releaſe by the other executor is a good plea. 3 Le. 209. Arg. cites 16 H. 7. 4.

5. *Releaſe* of a debt by one ſhall bind the other. D. 23. b. pl. 146. Marg. cites 4 H. 7. 4. b.

6. One ſhall not have *account* againſt the other. D. 23. b. 146. Marg. cites Fitzh. Executors, 21.

[ 272 ] 7. They cannot make *partition of goods*. D. 23. b. Marg. cites 27 H. 8. 22.

8. *Devaſtavit* by one ſhall not make the other liable de bonis propriis. D. 23. b. pl. 146. Marg. cites Vet. Lib. Intrat'. 327.

9. Gift by one of a *bond* to a ſtranger, is good as to the parchment and wax, but not to the debt. D. 23. b. pl. 146. Marg. cites Trin. 38 Eliz. B. R. Rulſock v. Nicholſon.

10. *A falſe plea* pleaded *by one* executor, ſhall charge him only that pleads it. D. 174. b. pl. 21. Marg. cites 19 H. 6. 14 H. 7. 27. 29. 23 H. 7. 8.

11. *One*

11. *One executor waſtes*, he only ſhall be charged de bonis propriis. D. 210. a. pl. 23. Mich. 4 Eliz.

12. Two executors bring debt. *One is ſummoned and ſevered.* The other proſecutes to judgment. He that is ſummoned and ſevered ſhall not be received to *acknowledge ſatisfaction* of debt and damages recovered, becauſe he has not day, nor is privy to the judgment, but ſecluded of it, and yet his *releaſe* before judgment ſhall be a bar notwithſtanding the ſeverance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

13. Two executors make *partition of ſpecialties* of teſtator; after one releaſes to the debtor a bond which by the partition belong to the other, the debtor having notice of the partition, yet Chancery gave no relief; but if the releaſe had been got by *covin* for leſs than the juſt debt was, the debtor ſhould ſatisfy the overplus. Mo. 620. pl. 846. Mich. 42 & 43 Eliz. in Canc. Anon.

Ibid. 708. pl. 989. Hill. 37 Eliz. B. R. Goodall v. Wiatt. S. P.

14. If an *action* is brought *againſt one* executor where ſeveral are, and he *admits the writ and confeſſes the action*, this ſhall bind all the goods of the teſtator as well as if they were all named. Per Hern. Goldſb. 141. pl. 54. Hill. 43 Eliz. in caſe of Necton & al' v. Gennet & al'.

Judgment in ſuch caſe ſhall be given againſt all. D. 23, b. Marg. pl. 146. cites 28 H. 6. 3.

## (O. a. 2) What particular Intereſt he has in the Goods of the Teſtator.

1. GOODS which one has as executor are *not forfeited* by outlawry for debt, &c. or upon conviction or attainder of felony or treaſon. Wentw. Off. Ex. 85.

2. If a *villain* had been made *executor* his *lord could not take thoſe goods* which he had as executor, and for taking ſuch goods or for a debt due to the teſtator the villain might have ſued his lord. Went. Off. Ex. 85.

3. The goods of teſtator are *not to be taken in execution for executor's debt*, whether upon recognizance, ſtatute, or judgment had againſt the executor. Went. Off. Ex. 56.

4. Executor cannot *deviſe* the lands which he has *as executor*. Per Williams J. Arg. 3 Bulſ. 7. Hill. 12 Jac.

For he has them not as his own, or to his own uſe; but he may make a continuation of the executorſhip, and his executor ſhall have them as executor to the firſt teſtator. Went. Off. Executor, 17, 18. cites it as reſolved Hill. 30 Eliz.

5. In evidence to the jury in an action of debt, it was ſaid by Dyer and Manwood, that if *executors grant omnia bona ſua*, that the goods which they have as executors do not paſs, and cited 10 E. 4. b. by Danby. But the contrary was holden by Wray Ch. J. and by * Plowden in BRACEBRIDGE'S CASE, P. 18 Eliz. and they denied the opinion of 10 E. 4. to be law, for by ſuch grant made by executors the goods of the teſtator do paſs. Le. 263. pl. 351. 19 Eliz. C. B. Ld. St. John v. the Counteſs of Kent.

If *adminiſtrator* grants omnia bona ſua, the goods which he has as adminiſtrator will paſs, if he has no other goods.

Per Holt Ch. J. Ld. Raym. Rep. 1307. Mich. 8 Annæ, in caſe of Hutchinſon v. Savage.

6. If an *executor releaſes all actions, ſuits, and demands whatſoever which he had for any cauſe whatſoever*, this extends only to ſuch as he has in his own right, and not to ſuch as he hath as executor. Per Holt Ch. J. Show. Rep. 155. Paſch. 2 W. & M. in caſe of Knight v. Cole.

7. An executor may have *treſpaſs for taking goods in his time quare bona & catalla ſua* becauſe of the poſſeſſion, and ſo may a ſervant; but if *for* treſpaſs *in teſtator's time*, the words are *quæ fuerunt teſtatoris*. Per Holt Ch. J. 2 Show. 155. Paſch. 2 W. & M.

## (P. a) For what Debt of the Teſtator the Executor may be charged.

Though no writ of account lays againſt the executor of

[1. ACTION of debt lies againſt the executor upon *arrearages of account made by the executor* himſelf of receipts by teſtator. 2 H. 4. 13. b.]

ſuch receipts, yet he ſhall be charged in debt upon an account ſo made of the goods of the deceaſed if he has. Br. Executors, pl. 40. cites S. C.——Br. Dette, pl. 52. cites S. C.——Br. Account, pl. 25. cites S. C.

For auditors are by ſtatute *judges of record*, but one auditor only is not ſufficient, becauſe in ſuch caſe teſtator

[2. So it lies upon *arrearages of account found before auditors.* * 11 H. 6. 64. dubitatur; it ſeems to be intended auditors *aſſigned of record*; and ſo is 11 H. 4. 92. becauſe teſtator could not wage his law. 4 H. 6. 18. 10 H. 6. 25. † 11 H. 6. 48. But if teſtator was found in arrearages of account before auditors who were *not auditors within the ſtatute of Weſtminſter*, 2. but auditors at common law, the executors ſhall not be charged, becauſe they are not auditors of record. 10 H. 6. 25.]

might wage his law. Went. Off. Executors, 117.——And becauſe auditors are made judges by the ſtatute *W.* 2. 11. the arrearages which they have adjudged is a *debt by record*. Went. Off. Executors, 128.

* Br. Executors, pl. 58. cites S. C. that it was demurred in law, whether executors ſhould be charged in debt *upon arrearages of account of their teſtator?* and ſays, it ſeems clearly that they ſhall be, for *he was debtor of record*, and could not wage his law.——Br. Dette, pl. 67. cites S. C. accordingly, but that it was not adjudged.——Br. Executors, pl. 171. cites S. C.

† Br. Executors, pl. 163. cites S. C. but not S. P.——Otherwiſe of *guardian in ſocage*, he being out of the ſtatute W. 2. 11. as he thinks. Went. Off. Executors, 117. Marg. cites 10 Rep. 103.

‡ [ 274 ]

Debt *upon a contract* of the inteſtate

[3. The executor is not chargeable for *debt* due by teſtator *upon ſimple contract.* 10 H. 6. 25.]

does not lie againſt an adminiſtrator, adjudged per tot. Cur. Cro. E. 121. pl. 12. Mich. 30, 31 Eliz. B. R. Hughſon v. Webb.

The Court ex officio ought to abate the writ without exception of the party, and the defendant's plea takes not away the authority of the Court, but they may abate it any time after. Cro. E. 121. Hughſon v. Webb, cites 15 E. 4. 25.——And. 182. pl. 218. Anon. ſeems to be S. C.——But this caſe was denied to be law. Sid. 333. Paſch. 19 Car. 2. B. R.——And ſee Vaugh. 99. in caſe of Edgcomb and Dee, the remarks by Vaughan Ch. J.

Debt on ſimple contract lies againſt an executor if he pleaſes. Per Hale. Vent. 199. Paſch. 24 Car. 2. B. R. in caſe of Seaman v. Dee.

Debt againſt adminiſtrator, and declared that *inteſtate was indebted to J. S. 120 l. for wares ſold, who became bankrupt, and this debt was aſſigned to the plaintiff being a creditor* by the commiſſioners of bankrupt. Reſolved, the action did not lie; for that debt upon a ſimple contract lies not againſt an executor or adminiſtrator, and that the aſſignment by the commiſſioners of bankrupt did ‡ not alter the law, but that againſt an aſſignee wager of law did lie. It was adjudged for the defendant. Cro. C. 187. pl. 6. Paſch. 6 Car. B. R. Morgan v. Green.——Jo. 223. pl. 2. S. C. adjudged per tot. Cur. that the aſſignee ſhall have no other remedy than the debtee himſelf had, and this was by action of debt,

or

or action on the caſe in the life of the debtor, and after his death by action ſur le caſe againſt executors, and ſo the aſſignee may have action on the caſe but not debt.

Action of debt will not lie againſt executor for debt upon ſimple contract if the executor demurs to it, but aſſumpſit will. 1 Lev. 201. Hill. 18 & 19 Car. 2. B. R. Palmer v. Lawſon. ——— Sid. 332. pl. 17. S. C. held that the executor is not bound to uſe dilatories, but he may demur to it if he will, or he may anſwer to it if he will. ——— Yet debt will lie if executor pleaſe. Per Hale. Vent. 199. Paſch. 24 Car. 2. B. R. Seaman v. Dee.

Debt will lie on ſimple contract. 1 Bulſt. 158. Trin. 9 Jac. Strong v. . . . . .

[4. Regularly the executor ſhall *not* be charged *without ſpecialty* in any action *where the teſtator might have waged his law.* 9 Rep. 88. PINCHON'S CASE. Becauſe executor cannot wage his law of another's contract. 46 E. 3. 10. b. 11 H. 6. 48. b. Mich. 37 & 38 Eliz. B. R. agreed and adjudged. GERMAN AGAINST ROWLES.]

Br. Adminiſtrator, pl. 13. cites S. C. but not S. P.—Br. Dette, pl. 187, 188. in the other editions cites S. C. but not S. P. directly, but only by way of inference. ——— Where a man leaſes for life of the leſſee and the leſſee dies, action of debt lies againſt his executors without ſpecialty. Per Finch and the Serjeants. Br. Executor, pl. 33. cites 44 E. 3. 42. ——— So upon a leaſe for years; for where the teſtator cannot wage his law the executor ſhall be charged. Ibid. ——— Cro. E. 425. S. C.

## By what Action.

[5. 9 Rep. 87. PINCHON'S CASE. By all the juſtices and barons, that where the teſtator *upon a bond of* 200 *l.* to him *aſſumed to pay it on demand*, the executor may be charged *in an action upon the caſe in aſſumpſit*, becauſe the teſtator could not have *waged his law* in this action though it be mixed with a treſpaſs, as the action ſays, yet non moritur cum perſona. Pl. C. 101. NORWOOD AGAINST READ. 15 E. 4. 16. and this agrees with 9 Rep. 87. PINCHON'S CASE. *Debt* does not lie againſt executor *for eating and drinking of the teſtator*, becauſe the teſtator in this action might have waged his law.]

[6. 4 H. 7. 16. b. 9 Rep. 87. b. The ſame law of a *limner for his wages.* 4 H. 6. 19. b.]

[7. 9 Rep. 88. A *labourer within the ſtatute* ſhall charge the executor becauſe teſtator could not wage his law *. 2 H. 4. 14. b. 4 H. 6. 19. b. † 11 H. 6. 48. b.]

Becauſe ſuch ſervant was compellable by ſtatute to ſerve, and ſo could not wage his law. Went. Off. Executors, 121. ——— Debt againſt executors of N P. of 10 marks, and counted that he was retained with the teſtator in the art of a limner by the year, &c. Per Marten, executors ſhall not be charged without ſpecialty in this caſe; for there is a diverſity between this caſe and a common labourer, who may be compelled to labour in ſpite of his teeth, and his ſalary is put in certain by the ſtatute, and therefore there the maſter cannot wage his law, and therefore the executors ſhall be charged; contra in this caſe, for here he is not compellable to ſerve, and therefore it is his folly that he had not taken ſpecialty of his ſalary; quod non negatur. Br. Executors, pl. 87. cites 4 H. 6. 19.

But in caſe of ſervants not compellable, as waiters, &c. debt lies not againſt executors for their wages. Went. Off Executor, 121. ——— So of chaplain, Br. Dette, pl. 187. cites 11 H. 6. 48. ——— Br. Executor, pl. 163. cites S. C.

* Br. Dette, pl. 53. cites S. C. † Br. Executor, pl. 163. cites S. C. Per Chauntrell.

[8. If A. *by deed makes B. his general attorney to retain ſervants, and he retains one*, and after *A. makes B. his executor* and dies, the ſervant ſhall not have *debt* againſt the executor *for wages incurred in life of teſtator*, becauſe teſtator might have waged his law if action had been brought againſt him notwithſtanding the deed. 46 E.

Fol. 925.

Br. Adminiſtrator, pl. 13. cites S. C. but nothing is

there ſaid of the wager of law, and the caſe is thus, viz. Debt againſt adminiſtrators, becauſe the adminiſtrator himſelf by his deed indented retained the plaintiff to ſerve the inteſtate for 10 marks per ann. and becauſe it was not denied but that he had aſſets enter mains, and that the defendant himſelf had retained the plaintiff, therefore it was awarded that the plaintiff recover his debt and had elegit. Brook ſays, quod mirum! and it was debt in the detinet, &c. For it was ſaid, that the reaſon for why an executor or adminiſtrator ſhall not anſwer upon a ſimple contract of the deceaſed without ſpecialty is, becauſe he cannot have conuſance of the contract, and now he has conuſance of the contract by his own retainer by his deed; quod nota, tamen mirum! for though he has conuſance of the contract, yet it may be that the inteſtate has paid, of which the defendant cannot have conuſance.

46 E. 3. 10. (R. *Quære* this, becauſe as to the teſtator it was a contract made by other hands.)]

* [9. If the teſtator makes a contract and dies, and his *executor by his deed acknowledges the contract*, the action of *debt* lies againſt him for this, though the teſtator might have waged his law in the action, for he might have denied the contract of which plea the executor is ouſted by the deed. 46 E. 3. 11. adjudged 11 H. 6. 48. b. *without deed.*]

Br. Dette, pl. 53. cites S. C.—— Br. Executor, pl. 41. cites S. C.

[10. If a *ſervant be retained for a certain ſum* to ſerve in war, if the maſter dies, *debt* does not lie againſt his executor for the ſalary *without deed.* 2 H. 4. 14. b.]

So for arrears after death of leſſee though executor never entered or agreed. Yelv. 130. Houſe v. Webſter. —— S. P. by Markham Ch. J. becauſe in ſuch caſe the teſtator could not wage his law, and therefore the executor ſhall be charged. Br. Executor, pl. 127. cites 21 H. 6. 1.

[11. Action of *debt* lies againſt executor *for arrearages of rent incurred in life* of leſſee reſerved upon leaſe for life or years. 46 E. 3. 10. *without deed.* 11 H. 4. 64. b.]

Cro. E. 425. S. C.

[12. In an action of debt againſt an executor *for fees and charges by him expended as ſolicitor of the teſtator*, in a ſuit againſt the teſtator, if the executor *pleads ne unque executor*, ne unques *adminiſtravit ut executor*, and afterwards judgment *is given againſt him*, yet he may reverſe this in a writ of error; for it appears to the Court that the action does not lie againſt the executor, and the plea aforeſaid has not confeſſed the contract. M. 37, 38 Eliz. B. R. Adjudged in a writ of error, GERMAIN AGAINST ROWLES.]

13. *Detinue* was brought *by a feme againſt the executor of her baron of the moiety of his goods by the cuſtom*, and well. Br. Executors, pl. 128. cites 17 E. 3. 17.

14. Note per Davers, that where debt does not lie *upon a ſimple contract* againſt executors, yet if the creditor was in debt to the king he ſhall have *quo minus in Scaccario* of it by the common uſe. Br. Executors, pl. 176. cites 11 H. 7. 26.

Br. Dette, pl. 70. cites S. C.

15. *Debt againſt executors upon tally of their teſtator ſealed written by words, that the teſtator had put his ſeal to it to pay 20 l. and two ſcotches were in the tally*, and it was awarded that the plaintiff take nothing by his writ; and per Skrene the reaſon is, inaſmuch as the writing may be put out by water, &c. and a greater ſum written, &c. Br. Executors, pl. 60. cites 12 H. 4. 23.

16. *Executors* ſhall be charged *in debt of the exceſs which their teſtator lord of D. had received of his bailiff found before auditors aſſigned upon account*, and auditors aſſigned by the executors after the

the death of the teſtator. Br. Executor, pl. 159. cites 10 H. 6. 24, 25.

17. If *termor* be *in arrear of rent*, and makes executors and *dies*, and the *executors occupy*, they *ſhall be charged of the arrears*; but if they waive it and do not occupy, then e contra. And ſo ſee that the termor himſelf cannot waive, but the executors in whom no folly is *may waive*; per Aſcue J. quod nota quia nemo dedixit. [276] Br. Waiver de Choſes, pl. 10. cites 21 H. 6. 24.

18. *And* it is ſaid elſewhere, that where *a man takes land* for years, *rendering more rent than the land is worth*, and makes executors and dies, if the executors waive the land they ſhall be diſcharged of the rent; contra if they occupy. Br. Waiver de Choſes, pl. 10. cites 21 H. 6. 24.

19. *So of abbot* who takes ſuch leaſe, his ſucceſſor may waive it. Br. Waiver de Choſes, pl. 10. cites 21 H. 6. 24.

20. *Debt* againſt executors *of goods ſold to the teſtator*, the attorney was demanded, who ſaid that he would avow the ſuit; by which Littleton awarded, that he take nothing by his writ; for *where the teſtator might have waged his law*, the executor ſhall not be charged, and ſo ſee judgment ex officio without demurrer by the defendant; quod nota. Br. Executor, pl. 80. cites 15 E. 4. 25.

21. If a *creditor of the king ſhews tally of the Exchequer to the cuſtomer* or comptroller, who dies, this ſhall charge his executor as well as the cuſtomer or comptroller himſelf. Br. Executors, pl. 157. cites 2 H. 7. 8, 9. and 1 H. 7. 17.

22. *Debt* lay againſt adminiſtrator for *money* paid by plaintiff to inteſtate *to traffic with* for plaintiff, and this ſignified by *note* of inteſtate. D. 20. a. pl. 118. Trin. 28 H. 8.

23. The words of a leaſe are, that it ſhall not be lawful for leſſee to ſell, give, or grant his term aforeſaid, yet executor ſhall not *forfeit*. D. 65. b. pl. 8. Mich. 3 E. 6.

24. If A. *covenants with B. to put his ſon apprentice to C. or otherwiſe that the executors of A. ſhall pay B.* 20 *l.* and A. does not put his ſon apprentice to C. but dies, B. ſhall not have debt againſt the executors of A. for it *cannot be a debt in the executor where it was none in the teſtator*; adjudged. Cro. E. 232. pl. 2. Paſch. 33 Eliz.. Parrot v. Auſtin.

25. In all caſes where any price or value is ſet upon the thing in which the offence is committed, though he that did the offence dies, the executors ſhall be charged for this offence; as in the principal caſe of an *information for cutting* 100 *oaks growing on the land of the queen* to the value of 100 l. *or* if it were *for the taking of* 20 of the queen's *beaſts of the value of* 20 *l.* the executor ſhall be charged. *But* when the action or information is *for ſpoiling of graſs*, &c. *ad damnum*, &c. the executor ſhall not be charged; per Manwood, which was agreed for good law. Sav. 40. pl. 90. Mich. 24 & 25 Eliz. Sherrington's caſe.

26. The *teſtator retained an attorney of C. B. to proſecute a ſuit in that court.* Reſolved that an *action will lie for his fees* which be due to him in that ſuit againſt the executor of the teſtator, becauſe the teſtator in ſuch caſe could not wage his law; *but for monies ex-* *pended*

Cro. E. 459. pl. 4. Hill. 38 Eliz. S. C. held accordingly as to the firſt point

by three juſtices, but Fenner doubted thereof, and afterwards, Paſch. 38 Eliz. they held their opinion, that for thoſe fees in other courts the action lay not, and ſo the writ was abateable in toto, and ruled that judgment be reverſed niſi, &c.

*pended in ſuits in other courts by* the attorney, the *action will not lie.* Mo. 366. pl. 500. Mich. 36 & 37 Eliz. B. R. Rolls v. Germain.

27. Action grounded on a *ſimple contract* lies not againſt executors unleſs upon aſſumpſit for a debt due or owing by the teſtator himſelf, and not upon ſuch a *collateral matter* as the forbearance of the debt of another. See Owen, 57. Trin. 37 Eliz. Gowood v. Binks, and cites the caſe of Jordan v. Harvey.

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28. *Aſſumpſit* was brought *againſt an executor upon a promiſe of the teſtator to pay* 100 *l. in conſideration of the marriage of his daughter when required;* the defendant pleaded non aſſumpſit, and judgment was given in B. R. for the plaintiff; but upon error brought in Cam. Scacc. the judgment was reverſed, for that the action did not lie againſt the executor. Mo. 691. pl. 954. Mich. 37 & 38 Eliz. Rotheram v. Stibbing.

Cro. E. 454. pl. 1. Stubbing v. Rotheram, S. C. and judgment reverſed by all the juſtices præter Clerk; and Anderſon ſaid, that the reaſon why debt lies not againſt executor on the contract of the teſtator is, becauſe the law does not intend that he is privy thereto, or can have notice thereof, and he cannot wage his law for ſuch debt as the teſtator might, and when debt will not lie, it is not fit that this action upon a bare promiſe ſhould tie him; for it ſtands all upon one reaſon; and if theſe actions ſhould be allowable it would be very miſchievous. ——— Ibid. ſays, Note that the ſame term the like judgment was given between Griggs and Helhouse, in an action againſt an adminiſtrator on a promiſe of the inteſtate's to pay monies, &c. ——— S. C. cited Mo. 691. as adjudged, and judgment reverſed accordingly. ——— Cro. E. 459. pl. 2. Hill. 38 Eliz. Serle v. Rosse, S. P. and judgment in B. R. reverſed in Cam. Scacc. accordingly.

Yelv. 23. Whorwood v. Shaw, S. C. adjudged. — Brownl. 82. S. C. ſeems only a tranſlation of Yelv. ——— Cro. E. 729. pl. 66. Shaw v. Norwood, S. C. adjudged. ——— Ow. 127. S. C. adjudged.

29. A man by his will deviſed 40*l. to two infants* equally. The *executrix delivered the money to one to whom the defendant was executor, who made a bill ſealed, teſtifying that he had received the* 40 *l. to the uſe of the infants. One of the infants died inteſtate.* His adminiſtrator brought debt againſt the defendant the executor of the bailee. It was adjudged the action was maintainable, and the ſpecialty, although it was not made to the infants, yet it was a ſufficient teſtimony of the debt on which the executor is chargeable. Mo. 667. pl. 914. Hill. 42 Eliz. Shaw v. Norwood.

Noy, 43. St. John v. Bawdrip, S. C. adjudged for the plaintiff, and the judgment affirmed in error.

30. *Debt for a relief* was brought *by the executor of the lord againſt the executor of the heir* who was to pay it; and adjudged for the plaintiff. Cro. E. 883. pl. 17. Paſch. 44 Eliz. B. R. St. John v. Brandring.

S. P. yea though ſuch a debt grew for the moſt neceſſary thing, viz. meat and drink, which binds even an infant to payment, yet will it not charge an executor of one of full age; but this is meant where the contract is only by word. Went. Off. Ex. 120. ——— Mo. 433. pl. 608. S. C. & S. P. held by the greater opinion in the Exchequer chamber.

31. Aſſumpſit does not lie for debt by *ſimple contract* due by the teſtator againſt executors. Yelv. 20. Mich. 44 & 45 Eliz. B. R. Slade v. Morley.

32. A. brings debt againſt the executor of B. *upon the teſtator's aſſumpſit to pay* a certain ſum of money, which neither he nor his executor has paid. Reſolved by all the juſtices of England that the action well lies. Jenk. 290. pl. 28. cites 9 Rep. 86. b. Mich. 9 Jac. B. R. Pinchon's caſe. 10 Rep. 77. a. b. S. C. cited by Coke Ch. J. as adjudged, that action on the caſe lies againſt the executors, &c.

33. If a *promiſe be broken in life of teſtator*, be it for debt or collateral matter, yet the executor is liable. Roll. Rep. 266. pl. 39. Mich. 13 Jac. B. R. in caſe of Sander v. Eſterby.

34. In *debt againſt executor of leſſee for years for rent arrear*, the executor *pleaded, that he never agreed to the taking of the term*; but the plaintiff had judgment; for inaſmuch as he took upon him the office of executor he cannot refuſe the term. Lat. 261. Arg. Hill. 15 Jac. C. B. Rot. 3068. Heydon v. Hudſon.

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35. *Debt for rent againſt an executor upon a leaſe made to the teſtator for rent incurred after his death.* The defendant pleaded, *that after the death of the teſtator he relinquiſhed the poſſeſſion of the land*, and did not intermeddle therewith, *and had adminiſtered all the teſtator's goods.* The *writ was brought in the debet & detinet*, and adjudged good. 2dly, Reſolved, the *executor could not wave the poſſeſſion unleſs it had been ſpecially alleged that the rent was greater than the value of the land*, for then perhaps, by ſpecial pleading of it, he might be diſcharged of it. Cro. J. 549. pl. 10. Mich. 17 Jac. B. R. Mawle v. Cacyffyr. Palm. 112. Moule v. Moody. S. C. adjudged for the plaintiff. ——2 Roll. Rep. 131. Paule v. Moodie. S. C. all the juſtices agreed that the executor cannot waive the term and leaſe; but that notwithſtanding this waiver he ſhall be charged with the rent; and by Haughton J. admitting he may waive this term, yet he ought to give the leſſor notice of the waiver of it; and by Montague Ch. J. if the rent is more than the land is worth, the executor might have pleaded it, and in ſuch ſpecial caſe by his waiver of the term and leaſe, he might have diſcharged himſelf of the rent.

36. Debt againſt an *adminiſtrator*, who *pleaded that the inteſtate acknowledged a judgment to him for* 1500*l. and died, and that he retained goods to that value* to ſatisfy himſelf, *and that he had not aſſets ultra more than* 40 *s.* It was moved, that he ought to plead the general iſſue, and give this matter in evidence; per Hobart, *he may give this in evidence, or he may plead that the judgment is not ſatisfied or defeaſanced*; but we may not compel him to change his plea unleſs he will. Win. 70. Hill. 21 Jac. C. B. Bacon v. Weſton.

37. Executors may be charged *for debts and damages recovered againſt teſtator*, and debts *by recognizance.* And ſo alſo for debts *by ſtatute merchant*, though Ld. Brook thought the contrary. Went. Off. Ex. 117, 118.

38. *So* of *iſſues forfeited*, *fines* impoſed by juſtices at Weſtminſter, or at aſſizes, quarter-ſeſſions, commiſſioners of ſewers or bankrupts, by ſtewards in leets, &c. For all theſe *are debts of record* which executors ſtand charged withal. Went. Off. Ex. 117.

39. It ſeems that the executor is *liable in all caſes where teſtator could not have waged his law* had he been ſued in his life-time. See Went. Off. Ex. 118. 120.

40. Executor ſhall be chargeable for *money due to a gaoler by a priſoner for his diet;* becauſe it is for the public good to have priſoners kept, which cannot be without affording them victuals. Went. Off. Ex. 121, 122.

41. If one has an *exchequer order to receive money* of ſome officer of the crown, and delivers to one of them who has money of the king's then in his hands, but dies without paying the ſame, his executor ſhall be chargeable with payment thereof. Went. Off. Ex. 122.

42. An executor ſhall not be charged with a *treſpaſs committed by the teſtator.* Toth. 151. cites 3 & 4 Car. Holland v. Owen.

43. *Covenant* was brought *againſt the executor of the leſſee for non-payment of rent upon an expreſs covenant.* The defendant *pleads, that before the rent became due he aſſigned over to J. S.* The plaintiff demurs. It was ſaid by the Court, that though the defendant had aſſigned over before the rent became due, *yet he might be charged as executor upon the expreſs covenant, but* he could *not* be charged *as aſſignee, if he aſſigned over before the rent became due;* and here the plaintiff hath election either to charge him as aſſignee or executor, and having charged him as executor it is no plea; for as he might have charged the teſtator upon this expreſs covenant after aſſignment, ſo he may the executor, but then judgment ſhall be only de bonis teſtatoris. Freem. Rep. 377. pl. 489. Mich. 1674. Jenkins v. Hermitage.

[ 279 ] 44. If a man *deviſeth a term for years, being greatly indebted, and not leaving aſſets,* and the *executor aſſents* to the legacy, and the *deviſee enters,* a *creditor, that hath a judgment de bonis teſtatoris, cannot take this term in execution by averring that this aſſent* of the executor *was per fraudem; but* he muſt take advantage of it *by way of devaſtavit in the executor.* Arg. Freem. Rep. 465. pl. 636. Trin. 1678. in caſe of Knight v. Peachee.

45. An adminiſtrator *pendente lite* of a will is liable to actions. 2 Show. 69. pl. 54. Trin. 31 Car. 2. Impey v. Pitt.

46. A *ſcire facias lies againſt executor of bail.* 2 Show. 310. pl. 321. Trin. 35 Car. 2. B. R. Anon.

Inteſtate was a debtor by ſingle contract, but more than

47. By 1 *Jac.* 2. cap. 17. *no adminiſtrator ſhall be cited to* account *otherwiſe than by inventory, but in behalf of a minor, or by a creditor or next of kin.*

ſix years were elapſed. Adjudged that the perſon to whom he was a debtor is creditor within this act to compel the adminiſtrator to account; for it is a debt though barrable by the ſtatute of limitations, and ſo a prohibition moved for to the ſpiritual court was denied. Ld. Raym. Rep. 232. Trin. 9 W. 3. Wainford v. Barker.

48. An adminiſtrator muſt *give bond to the ſheriff* of the penalty of 40l. *for his appearance* at the return of the writ, and the ſheriff is not obliged to diſcharge him on the attorney's promiſe to appear, but if an attorney of this court, or of C. B. do make ſuch promiſe, the Court will compel him to perform it. Cumb. 299. Mich. 6 W. & M. in B. R.

49. On

49. On a trial before Holt Ch. J. in *debt for rent*, he held that an adminiſtrator is *chargeable as aſſignee* for the time he enjoys it, and is in poſſeſſion. Show. 348. Paſch. 4 W. & M. Buck v. Barnard.

50. In an *action againſt a teſtator upon a ſimple contract*, there is an interlocutory judgment given and writ of inquiry awarded, but before final judgment given the party dies. Judgment is entered up againſt him purſuant to the ſtatute 8 & 9 W. 3. cap. 10. Per Cur. B. R. this is a judgment in the teſtator's time, and ſhall be paid before bonds. 1 Salk. 42. pl. 12. Paſch. 3 Ann. B. R. Weſton v. James.

51. 4 & 5 Ann. 16. *makes adminiſtrator of guardian, bailiff, receiver, jointenants, and tenants in common, liable to* account.

52. *Tenant for life and remainderman join in mortgage* of lands, and they both *covenanted* and gave bond *to pay* the money; the tenant for life dies. Lord Cowper ſaid, if remainderman pays the money and takes up the bond, or *gets the covenant aſſigned*, he may prefer his bill againſt the executors of the tenant for life, but not elſe. G. Equ. Rep. 69. Paſch. 7 Ann. in caſe of Hungerford v. Hungerford.

53. *Attorney* having *delivered up deeds to an executor, which he was not obliged to do till his bill was paid, which deeds would be of great uſe to the executor in ſeveral ſuits that were then carrying on, the executor having changed his attorney*, this is a *ſufficient conſideration to make the executor liable* for the full demand, whether aſſets or not. MS. Tab. January 27th, 1719. Ducheſs of Hamilton v. Incledon.

54. An *huſband* voluntarily, and after marriage, *allows the wife, for her ſeparate uſe, to make profit of all butter, eggs, pigs, poultry, and fruit, beyond what is uſed in the family*, out of which the *wife ſaves* 100*l. which the huſband borrows, and dies.* The Court will allow this agreement, to encourage the wife's frugality, and the *wife ſhall come in a creditor for this* 100*l.* eſpecially there being no defect of aſſets to pay debts. 3 Wms.'s Rep. 337. Mich. 1734. Slanning & al' v. Style & al'.

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## (P. a. 2) Where an Executor ſhall pay Coſts.

1. A. AN adminiſtrator brought *account againſt B. ſuppoſing B. to be receiver to his inteſtate*, and *before count made A. was nonſuited.* B. cannot have his coſts adjudged to him by the Court, by virtue of the ſtatute 23 H. 8. becauſe A. did not ſuppoſe the defendant to be his receiver, but receiver of the inteſtate. Bendl. 19. Paſch. 28 & 29 H. 8. Allen v. Allen.

Kelw. 207. b. pl. 4. S. C. in totidem verbis.

2. In *aſſumpſit* brought *by the plaintiff as adminiſtrator* of J. S. *upon a promiſe made to the teſtator*; after iſſue joined, the *plaintiff was nonſuit.* Coſts were prayed for the defendant, upon the ſtatute of 8 Eliz. which giveth coſts againſt him who ſueth maliciouſly; but the Court denied to give coſts, for that it cannot be

ſaid to be uſed maliciouſly being for another, neither can it be known but that the plaintiff had colour to ſue. Cro. E. 69. pl. 21. Mich. 29 & 30 Eliz. Ford v. Roll.

3. In *aſſumpſit* by adminiſtrator upon a promiſe made *to the teſtator*, he was *nonſuit*; the Court would not give coſts. Cro. E. 69. pl. 21. Mich. 29 & 30 Eliz. B. R. Ford v. Rolls.

Nov. 64. Lady Digby's caſe, S. P. held accordingly.

4. Where they bring action *in their own rights*, as upon converſion or treſpaſs made to them, coſts ſhall be paid, ſic dictum fuit. Savil, 134. pl. 211. Paſch. 36 Eliz. Drake v. Royman.

——— But otherwiſe where they bring action as executors or adminiſtrators in right of their teſtator, &c. as de bonis aſportatis, by the ſtatute 4 E. 3. Ibid. ——— Action upon *trover and converſion of goods of the inteſtate.* The time of the converſion being *ſuppoſed after the adminiſtration committed*, verdict being found againſt the plaintiff, the queſtion was, Whether the plaintiff ſhould pay coſts? And reſolved that this action being grounded upon the converſion in his own time, and not in the time of the inteſtate, was as his own proper action; wherefore he ſhould pay coſts. Cro. C. 219. pl. 3. Trin. 7 Car. B. R. Atkey v. Heard. ——— Jo. 241. pl 6. S. C. accordingly. ——— 2 Show. 342. pl. 350. Paſch. 36 Car. 2. B. R. Blackway v. Betton, S. P. ruled accordingly per tot. Cur. ——— 2 Ld. Raym. Rep. 865. Arg. cites the caſe of Atkey v. Heard, and admitted per Cur. for in that caſe the plaintiff might have ſued without naming himſelf executor if the goods were once in his poſſeſſion.

5. *Debt againſt an executor upon an obligation made by his teſtator.* The *plaintiff was nonſuited.* The defendant had coſts by order of Court. Otherwiſe it is where an executor is plaintiff, and is nonſuited; for it cannot be intended that it was conceived upon malice by him. Cro. E. 503. pl. 25. Mich. 38 & 39 Eliz. in B. R. Fetherſton v. Allybon.

6. In *debt againſt baron and feme, as executors, &c.* they *plead payment by the teſtator*, and upon iſſue it is found againſt them, and judgment quod recuperet debitum de bonis teſtatoris, and the coſts and damages, &c. And if not, then the coſts and damages de bonis propriis. And in error it was held to be a good judgment, although a feme covert cannot have goods in her own right; yet ſhe may have them as executrix. And ſo judgment affirmed. Noy, 125, 126. Anon.

7. It was adjudged by the whole Court, that in thoſe caſes where an executor is plaintiff, touching things concerning the teſtament, and is *nonſuited, or the verdict paſſes againſt him*, that he ſhall not pay coſts upon the new ſtatute 4 Jac. for the ſtatute ought to have a reaſonable intendment, and it cannot be preſumed to be any fault in the executor who complains, becauſe he cannot have perfect notice of what his teſtator did, and ſo it was reſolved by all the judges of C. B. Brownl. 107. Hill. 7 Jac. Anon.

[ 281 ] 8. Executor *declares for goods of teſtator*'s taken out of his poſſeſſion, but on evidence they appear to be *his own goods.* He ſhall be nonſuited and pay coſts; per Holt Ch. J. 6 Mod. 94.

9. If a man dies inteſtate, and *he to whom the adminiſtration appertains is ſued by others which pretend to be adminiſtrators*, and *ſentence is given againſt the right adminiſtrator*, and coſts given againſt him, the *coſts ſhall not be of the proper goods of the adminiſtrator, but of* the goods of *the inteſtate*; as the coſts which are ſpent in the ſpiritual court, for the probate of a teſtament, ſhall be only of the goods of the teſtator; per Hobart Ch. J. Winch. 11. 19 Jac. Anon.

10. If

10. If executors are *nonſuit, or judgment given againſt them upon a verdict*, they ſhall not pay coſts within the ſtatute of 23 H. 8. or 4 Jac. and ſo is the conſtant practice, for the *ſtatute ſpeaks of any contract or ſpecialty made with the plaintiff, or between the plaintiff and defendant;* and the executor brings an action upon the contract of another. Winch. 70. Hill. 21 Jac. C. B. agreed in caſe of Trehern v. Claybrook.

11. If *executors have a leaſe for years*, and *they demiſe it rendering rent*, and for rent arrear they bring an *action*, it *ſhall be in the debet and detinet*, and they ſhall pay coſts if they be nonſuited, and yet their title is as executors, but it is *founded upon their own contract.* Hut. 79. Hill. 1 Car. in caſe of Townly v. Steele.

12. So if they bring an action of *treſpaſs for the taking of goods which came to their poſſeſſion, which goods were*, in truth, *tortiouſly taken by the teſtator, and died poſſeſſed thereof*, and they being nonſuited they ſhall pay coſts; and executors in actions brought againſt them ſhall pay coſts, and if they have no goods of the teſtator it ſhall be de bonis propriis. Hutt. 79. Hill. 1 Car. in caſe of Townly v. Steele.

13. An Engliſh *bill* was preferred *to be relieved againſt a bond entered into by the plaintiff to the defendant's teſtator, upon an agreement of the teſtator's to ſave the plaintiff harmleſs againſt others.* It was afterwards ordered that the executor here being a defendant ſhould not pay coſts, becauſe it is without a precedent, and that it was no reaſon to give coſts in equity becauſe the law allows coſts; for that an executor cannot plead the recovery at law in excuſe of aſſets. Hardr. 165. Hill. 1659. Twiſleton v. Thelwell.

14. Twiſden conceived executors *only liable by* 13 *Car.* 2. *to pay double coſts, but not within* 3 *Jac. unleſs debt be brought againſt him on the firſt judgment, which he has by devaſtavit made his own debt*, which the Court agreed. Keb. 716. in pl. 42. Paſch. 16 Car. 2. B. R. in caſe of Webſter v. Bat.

15. The Ch. J. on conference with all the judges at Serjeant's-inn, delivered the opinion of the Court, that *on judgment de bonis teſtatoris* an *executor that has no aſſets ſhall not pay coſts of damage clear*, but this follows the principal debt, whereupon they ordered ſo much as was aſſeſſed for damage clear to be delivered back by the ſheriff out of execution. 2 Keb. 275. pl. 36. Mich. 19 Car. 2. B. R. Upton v. Noell.

16. An *adminiſtrator brings debt upon an obligation.* The defendant *pleads payment to himſelf;* upon which it was *found for the defendant.* Coleman prayed that he might have coſts, as where an executor brings an action ſur trover and converſion in his own time, and found againſt him, it was ruled in ATKINS's caſe, Cro. E. that he ſhould pay coſts, and here of his own knowledge he had no cauſe of action, the money being paid to himſelf; but the Court reſolved that there ought to be no coſts in this caſe, for the action of trover in his own time might have been brought in his own name, ſo it was needleſs to name himſelf executor or adminiſtrator, but *the action here is merely in right of the inteſtate.* Vent. 92. Trin. 22 Car. 2. B. R. Anon. [ 282 ]

17. Executor or adminiſtrator *nonſuit* ſhall not pay coſts, though for a tort *done in their own time.* 3 Lev. 60. Trin. 34 Car. 2. C. B. Maſon v. Jackſon.

18. Lady Pye executrix to her huſband found a *ſtatute of* 2500*l.* againſt the duke of Norfolk, &c. Upon her ſtirring in it, a deed of *covenant was ſhewn to her counſel*, and afterwards ſhewn in court for the delivery of the ſtatute up; however ſhe proceeded and brought in a croſs-bill, and put them to as much trouble as ſhe could. Upon the hearing it appeared *that the ſtatute was ſatisfied*, and ordered to be vacated, not aſſigned, and ſhe ordered to pay coſts, not as to oblige her perſon, but out of the eſtate. Skin. 85. pl. 2. Hill. 35 Car. 2. Lady Pye v. Duke of Norfolk.

19. *Executor's agent refuſing to pay a legacy* becauſe of uncivil language given him by the legatees, but confeſſing aſſets, decreed to pay the legacies with intereſt from the time they were made payable, and coſts out of his own eſtate. Fin. Rep. 213. Trin. 27 Car. 2. Ireland and Walthew v. Thurſton and Smith.

2 Jo. 47. Bull v. Palmer, S. C. accordingly; for he

20. An *executor ſues on an inſimul computaſſet with himſelf for a debt due to the teſtator and is nonſuited*, he ſhall not pay coſts; per three juſtices, but Wild e contra. 2 Lev. 165. Hill. 27 & 28 Car. 2. B. R. Bulmer v. Palmer.

makes his title as executor, and the money recovered ſhall be aſſets. ——— Freem. Rep. 424. pl. 568. S. C. held accordingly. ——— S. P. contra per Treby Ch. J. Ld. Raym. Rep. 437. For the accounting with the executor gives not any new duty, but only aſcertains that which was due before.

21. An action brought againſt two *executors*. *One appears and pleads* no aſſets, and found againſt him. Judgment againſt both, but with coſts only againſt him that did appear and plead. Quære if good. 2 Show. 365. pl. 354. Trin. 36 Car. 2. B. R. Anon.

22. *J. S. was in execution in the cuſtody of the defendant at the ſuit of teſtator.* After whoſe death *J. S. eſcaped; whereupon the executor brought action of debt and was nonſuited.* The defendant prayed coſts upon the ſtatute, but it was denied, becauſe he brought the action as executor, and not in his own right; for Coke Ch. J. ſaid, that the damages which the executor ſhould recover would be aſſets, and when he brings ſuch action it is in the detinet. Roll. Rep. 63. pl. 8. Mich. 12 Jac. B. R. Long v. Winſcombe.

3 Lev. 375. S. C. held accordingly. ——4 Mod. 245. S. C. held accordingly,

23. *Judgment* was given againſt an executor who brought a *writ of error*, and the *judgment* was *affirmed*, and ruled that the executor ſhall not pay coſts, and the courſe always has been accordingly, which the Court ſaid was the beſt expoſitor of the ſtatute. Skin. 400. pl. 34. Mich. 5 W. & M. in B. R. Gale v. Till.

though not exempted by ſtat. 3 Jac. cap. 8. —— Comb. 228. S. C. held accordingly. ——Carth. 281. S. C. held accordingly. ——— Mod. 77. pl. 35. Mich. 22 Car. 2. B. R. Legg v. Richards, S. P. ——Vent. 166. S. C.

24. In an action upon the caſe againſt an executor upon *plene adminiſtravit* pleaded, the *plaintiff muſt prove his debt*, otherwiſe he ſhall recover but 1d. damages though there be aſſets, for the plea only admits the debt, but not the quantity. Per Holt Ch. J. Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelley's caſe.

25. Adjudged, that where executors ſue upon any *contract of their teſtator, or for any wrong done to him*, they ſhall pay no coſts either upon a nonſuit or verdict againſt them; ſo wherever he muſt ſue as * executor, as for inſtance, he brought an action of *debt upon a bond due to his teſtator*; the defendant *pleaded payment of the money to himſelf*, viz. *to the executor*, upon which they were at iſſue, and a *verdict againſt the plaintiff*, yet he paid no coſts; but if he had brought the money into court, then the plaintiff muſt proceed at his peril. 3 Salk. 105. Hill. 8 W. 3. B. R. Bigland v. Robinſon.

26. In all caſes where an executor or adminiſtrator *ſues for a debt or other thing belonging to the teſtator*, &c. *and grounds his action upon the ſame contract that was to the teſtator*, he ſhall not pay coſts if he fail in the ſuit; but *if he grounds his action upon a contract* expreſſed, or by implication and operation of law, *which accrues to him after the death of the teſtator*, there the action lies in his own name, and the naming him executor, &c. is void, and he ſhall pay coſts; per Treby Ch. J. and Powel J. Ld. Raym. Rep. 437. Hill. 10 W. 3. in the caſe of Nicholas v. Killigrew.

27. If an *adminiſtrator brings an action for money received to his uſe, the ſame being ſo much due to the inteſtate, and received by the defendant after the inteſtate's death*, and the plaintiff is *nonſuited*, he ſhall pay coſts. Ld. Raym. Rep. 436. Hill. 10 W. 3. Nicholas v. Killigrew.

28. If the executor, &c. brings *an action upon an inſimul computaſſet with himſelf after the death of the teſtator*, he ſhall pay coſts; and yet it is for a duty due to the teſtator, and not altered; for the accounting with the executor does not give any new duty, but only aſcertains that which was due before; per Treby Ch. J. Ld. Raym. Rep. 437. Hill. 10 W. 3. in caſe of Nicholas v. Killigrew. 2 Jo. 47. Paſch. 28 Car. 2. B. R. Bull v. Palmer, S. P. held e contra that he ſhall not pay coſts.——

2 Lev. 165. S. C. Three juſtices held that he ſhall not pay coſts; for the action is in the right of his executorſhip, and the money to be recovered ſhall be aſſets, but Wild J. held e contra.

29. The *reaſon why* an executor, defendant, or plaintiff, upon a *nonſuit*, ſhall pay no coſts, is, becauſe the ſuit being *in auter droit*, he may well be thought *miſconuſant* of the truth of the cauſe of action. Per Cur. 12 Mod. 440. Hill. 12 W. 3. Anon.

30. Executor ſhall pay coſts for *not going on to trial*. Per Cur. Far. 98. Mich. 1 Ann. B. R. Anon. So of adminiſtrator, Far. 118.

Mich. 1 Ann. B. R. Anon.——S. P. 1 Salk. 314. pl. 21. Paſch. 2 Ann. B. R.

31. Where the *thing ſued for is aſſets* in the executor or adminiſtrator *before recovery*, there they ſhall pay coſts on the nonſuit; or when the *entire cauſe of action ariſes in his own time*. Per Powell. 6 Mod. 92. Hill. 2 Ann. B. R.

32. In *trover*, &c. *by an executor upon a trover*, &c. *in his own time*, he ſhall pay coſts of nonſuit; for he need not name himſelf executor, and the goods are aſſets in his hands, though he never recovers And by the better opinion, adminiſtrator ſhall. 8 Mod. 108.

recovers them. Per Cur. 1 Salk. 314. pl. 21. Paſch. 2 Ann. B. R. in caſe of Eaves v. Mocato.

Mich. 9 Geo. Coatſworth v. Shaftoe. ——So the adminiſtrator ſhall pay coſts where he declares that the inteſtate at his death was poſſeſſed of goods, and that after his death, and before adminiſtration committed, they came to the defendant's hands who converted them, and it is found for the defendant, the converſion being ſince the death of the inteſtate. Vent. 109, 110. Hill. 22 & 23 Car. 2. B. R. Anon.

33. *For rent* accruing in executor's own time, executor nonſuited ſhall pay coſts. 6 Mod. 92, 93. Per Powel J. Hill. 2 Ann. B. R. * ſays it was agreed to have been adjudged, as alſo that in covenant with the teſtator, and breach in executor's own time, he ſhould pay coſts.

The reporter makes a quære if there be any difference upon this account between covenant for rent on a covenant made with a teſtator, and debt for rent upon a leaſe made with him.

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35. Huſband and wife declare on an indebitatus aſſumpſit to them as executors. On a *nonſuit* they ſhall pay coſts. 1 Salk. 207. pl. 6. Hill. 2 Ann. B. R. Jenkins v. Plume.

6 Mod. 91. S. C. adjornatur. —— Ibid. 181. S. C. adjudged accordingly. —— 3 Salk. 105. pl. 3. S. C. held accordingly.

36. Executor brought action, and declared on an *inſimul computaſſet with himſelf*, defendant could not have coſts, becauſe ſuch promiſe begat not a new cauſe of action, but aſcertained the old, which remained ſtill the debt of the teſtator. 1 Salk. 207. cited per Cur. as the caſe of Elwes v. Mocato.

6 Mod. 93. Arg. cites S. C.

37. If there was *judgment and execution in teſtator's life, and eſcape in executor's time*, upon a *nonſuit* in action by executor, for this eſcape he ſhall not pay coſts; but if he had *judgment and execution in his own time*, and an *eſcape* had happened, for which he brings action and is nonſuited, he ſhall pay coſts. Per Holt Ch. J. 6 Mod. 92. Hill. 2 Ann. B. R. in caſe of Jenkins v. Plume.

38. If teſtator's goods are taken, and *converted* before they come to the executor's hands, he ſhall not pay coſts upon a *nonſuit* in an action brought for theſe goods, for they were *never aſſets;* per Holt Ch. J. 1 Salk. 208. pl. 6. Hill. 2 Ann. B. R. Jenkins v. Plume, alias Hill.

S. C. cited 6 Mod. 93. Arg. by the name of Elwis v. Mocato.

39. Executor brought *aſſumpſit for money of his teſtator, had and received by the defendant to the uſe of the plaintiff as executor, and was nonſuit.* Per Cur. he ſhall not pay coſts, for he could not ſue but as executor, and it is not material whether the money was received by the defendant ſince the death of the teſtator, or before; for ſuppoſe it ſince, it is not aſſets in the hands of the executor till it is recovered. 1 Salk. 314. pl. 21. Paſch. 2 Ann. B. R. Eaves v. Mocato.

1 Salk. 207. pl 6. S. C. accordingly. —— 3 Salk. 105, 106. S. C. held accordingly. —— 11 Mod. 174. S. C. accordingly. —— So of adminiſtrator, 8 Mod. 108. Mich. 9 Geo. Coatſworth v. Shaftoe, S. P. by the better opinion.

40. Where the *executor need not*, though he does, *name himſelf executor*, he ſhall pay coſts on a nonſuit. 6 Mod. 181. Trin. 3 Ann. B. R. Jenkins v. Plumbe.

41. In an *aſſumpſit by an executor for money received after the death of the teſtator*, if the executor be nonſuit, he ſhall pay coſts; for

the law gave this privilege to executors of not paying coſts, only where the cauſe of action accrued in the teſtator's life-time; and there, becauſe it could not be ſuppoſed that the executor was conuſant or privy to the act of the teſtator. 11 Mod. 135. pl. 17. Trin. 6 Ann. in B. R. Modely & Ux' v. York.

42. Action brought by an *adminiſtrator*, and *declares* upon two counts, one *upon a promiſe to* the *inteſtate* in his life-time, the other *upon a promiſe to* the *plaintiff* himſelf, and names himſelf adminiſtrator in both; and upon the trial the plaintiff was nonſuit; and the queſtion was, whether he ſhould pay coſts? Powel J. Holt abſente, ſaid, that theſe two counts could not be joined, and if an entire judgment had been given, judgment ſhould have been arreſted; but it is a queſtion, whether it might not have been made good by taking judgment upon count only? But in this caſe [285] the plaintiff muſt pay coſts, becauſe *nonſuit goes to the whole;* and ſo it was ruled by Powell, Powis, and Gould. 11 Mod. 256. pl. 10. Mich. 1709. B. R. Jones v. Wilſon.

43. In an action of *trover*, the plaintiff declared that the *teſtator was poſſeſſed of the goods in queſtion, and* being ſo poſſeſſed *made his will, and the plaintiff executrix, and died, after whoſe death the goods came to the hands and poſſeſſion of the defendant by his finding them, who converted them to his own uſe.* Upon not guilty pleaded the plaintiff was nonſuited. The Court reſolved here that the plaintiff ſhould pay coſts, for his teſtator died poſſeſſed, and then the property and poſſeſſion was veſted in his executor, and the trover and converſion by the defendant was in his time, and therefore *he might have had an action in his own name without alleging himſelf executor;* but in the caſe of HUNT v. BALLOE, cited as now lately ſettled and reſolved in this court, that though the trover and converſion was alleged in the time of the executor, yet there it appeared that the teſtator did not die in poſſeſſion of the goods, and therefore there is a difference between the caſe. Comyns's Rep. 162. pl. 110. Paſch. 8 Ann. C. B. Hole & Ux' v. King.

44. An executor brought *debt upon a bond* entered into by the defendant *to the teſtator* in 1676, and a *breach was aſſigned to be made* by the defendant *in the executor's time* about a year before the action brought; and on iſſue thereupon, verdict was given for the defendant. And Serjeant Chapple moved the plaintiff might pay coſts, becauſe the breach was aſſigned to be done after the teſtator's death in the executor's time; ſed non allocatur; for per Cur. the bond is the cauſe of action, and the plaintiff could not ſue but as executor, and therefore the motion was denied. 2 Ld. Raym. Rep. 1413, 1414. Hill. 12 Geo. B. R. Portman v. Cane.

45. *Plaintiffs executors do not pay coſts upon the original judgment, but* it has been always held that *defendants executors do.* The ſame diſtinction he thought ought to be obſerved upon writs of error, eſpecially as in the preſent caſe the executor is found to be guilty of a devaſtavit; by the chief juſtice, to which the others agreed. 2 Barnard. in B. R. 450. Paſch. 7 Geo. 2. in caſe of Caſwell v. Norman.

46. Where

46. Where a *bill* is brought *to ſecure* and have *the benefit of a contingent intereſt deviſed over*, the coſts ſhall be paid out of the aſſets of the teſtator, who by his will has occaſioned the difficulty. 3 Wms.'s Rep. 303. Trin. 1734. Studholme v. Hodgſon.

## (Q. a) What Debts ought to be firſt ſatisfied.

[1. IF the teſtator had acknowledged a *ſtatute for performance of covenants* in certain indentures, yet the executor cannot plead this in bar of action of *debt upon a bond*, the *ſtatute not being forfeited at the time*, becauſe it is uncertain whether it ſhall ever be forfeited. Adjudged 5 Rep. 28. b. * HARRISON'S CASE. Contra P. 38 Eliz. B. R. adjudged, † WOODCOCK AGAINST FOX.]

* Roll. Rep. 405. pl. 26. S. C. cited and agreed. —— S. C. cited Bridgman, 80. —— Mo. 752. pl. 1034.

Hill. 1 Jac. S. P. held accordingly by Popham and Gawdy. † Gouldſb. 142. pl. 57. Hill. 43 Eliz. Woodcock v. Hern, S. C. Fenner held the plea good, but Gawdy ſaid he had ‡ heard divers learned men doubt of it; and he thought, that if the executor pays this debt, and the ſtatute is broken after, he ſhall be chargeable in a devaſtavit of his own proper goods.

If in this caſe the recognizance or ſtatute be executed by extent upon the teſtator's lands in his life-time, the judgment ſhall not ouſt it; for the land was firſt bound by the ſtatute or recognizance. Jenk. 274. pl. 94.

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[2. If the teſtator had acknowledged a *recognizance with condition for the payment of a leſs ſum at a day to come*, the executor may plead this recognizance in bar of an action of debt on a *bond*, though the day of payment by the condition of the recognizance be not yet come, becauſe this is a duty preſently and certain, inaſmuch as the condition is for the payment of money. Tr. 14 Ja. B. R. agreed. ROBSON AGAINST FRANCIS.]

Bridgm. 79. Robinſon v. Francis, S.C. & S.P. ſeems to be agreed. —— Roll. Rep. 405. pl. 36. S. C. adjornatur. ——

S. C. cited by Vaughan Ch. J. Vaugh. 103. that ſuch recognizances are to be ſatisfied before debts on ſimple contract, and before debts by obligations alſo.

[3. But if the *condition of the recognizance had been for the payment of* 100 *l. to an infant when he comes to his full age*, this recognizance during the infancy is no bar of a *debt upon bond*, becauſe it is uncertain whether ever any thing ſhall be paid upon the recognizance; for the infant may die before his full age, and then nothing ſhall be paid. Tr. 14 Ja. B. R. Dubitatur. ROBSON AGAINST FRANCIS.]

Bridgm. 79. S. C. and Doderidge and Haughton were of opinion for the plaintiff, but Mountague e contra. ——

Roll. Rep. 405. pl. 36. S. C. adjornatur.

[4. If the teſtator acknowledges a recognizance in nature of a *ſtatute-ſtaple*, whereof the *defeaſance* is, that where the conuſee and teſtator are bound in a bond to B. a ſtranger for the debt of the teſtator, and as his *ſurety*, with condition for payment of 100 l. at a day yet to come, it is granted by the ſaid defeaſance, that *if the teſtator, his executors, or aſſigns, pay the* 100 *l. to B. at the day*, then the ſtatute ſhall be void. Though in this caſe *the day of payment is not yet come*, and though it be *a collateral ſum to be paid to a ſtranger to the ſtatute*, and not to the conuſee, and ſo *no duty to the conuſee*, and peradventure the heir of the teſtator will pay the money

Cro. C. 362. pl. 4. S. C. & S. P. agreed, but judgment was given for the plaintiff for an inſufficiency and fault in the plea in bar. —— S. C. cited

money * at the day, yet inasmuch as it is for payment of the money certain, for which by intendment the executor will be charged, the *executor may plead this statute in bar of an action of debt upon a bond* before the day of payment comes. Pasch. 10 Car. B. R. per Cur. GOLDSMITH AGAINST SIDNOR. But judgment was given for the plaintiff for a default in the plea in bar. Intratur Mich. 9 Car. Rot. 432.]

* Fol. 926. by Vaughan Ch. J. Vaugh. 102. in case of Edgecomb v. Dee.

[5. Where there *are two debts upon specialties*, and *of the one the day of payment is past, and of the other the day* of payment *is not come*, yet he cannot pay this debt whereof the day of payment is not come before the other. Dr. and Stud. 77. b. 9 E. 4. 13.]

[6. If there are *several debts due to several persons by obligations or by contracts*, and *for the one debt an action is brought*, the executor, administrator, or ordinary, cannot pay the other debt whereof no action is brought, before this for which the action is brought. Dr. and Stud. 77. D. 28 & 29 H. 8. 32. pl. 2. D. 6 & 7 Eliz. 232. pl. 5. † 48 E. 3. 21. b. KELLOWAY, 21 H. 7. 74. per Frowike.]

† Br. Administrator, pl. 14. cites S. C. but not S. P. —Fitzh. Administrator, pl. 18. cites S. C.

—— S. P. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 26. cap. 10.

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[7. So if *action brought against an executor abate by a plea that he was administrator*, and not executor, and after other writ is brought against him as administrator by *Journey's Accounts*, he cannot pay other debts mesne between the two actions brought for this debt, for he ought to plead fully administered the day of the first writ brought. 48 E. 3. 21. b.]

Fitzh. Administrator, pl. 18. cites S. C. —— Br. Administrator, pl. 14. cites S. C. but says nothing as to paying other debts. —— And see (T. a) pl. 3. S. C. where the matter as to payment of other debts mesne between the two actions is taken into a parenthesis as a remark of Roll.

[8. If there are *two actions brought* against an executor, *one by A. and another by B.* the executor ought to pay that debt, whereof he has *first notice of the action brought*, though this writ was last purchased.]

[9. If there are *several actions brought* against executors, &c. *of equal nature*, the executor cannot pay any of them before the other pending the actions.]

Where two have several obligations of 20 l. and both bring several actions of debt together, the executor may pay the one, and the other has no remedy if he has not more goods of the testator. Br. Executors, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap. 10.

10. If there are *several actions brought* against an executor, &c. *of equal nature*, the executor *may acknowledge the judgment to any of them* who has an action depending, though his action was brought after the others. Dr. and Stud. 77. b. Kelloway, 21 H. 7. 74. per Cur. 9 E. 4. 13.]

11. If *two several recoveries are against executor*, the first recovery shall be first executed; for if he pays the last first, this is a devastaverunt. Br. Executor, pl. 103. cites 5 H. 7. 27.

S. P. and this is a sufficient discharge against the other. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap. 10.

12. If

12. If executors or adminiſtrators, or the ordinary, *pays debts by ſimple contract before obligation*, &c. they *ſhall anſwer the obligee of their own proper money if they have not aſſets*. Br. Adminiſtrator, pl. 50. cites 11 H. 7. 12.

13. They ought to pay *judgments* and condemnations *before obligations*, but *obligations* ought to be paid *before contracts*. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap. 10.

14. *Scire facias againſt executors on a judgment in debt againſt their teſtator.* They *pleaded, that before they had any conuſance thereof, they had fully adminiſtered by paying debts on bonds.* On a demurrer it was adjudged for the plaintiff that it was no plea, becauſe they at their peril ought to take notice of debts on record, and ought to pay ſuch debts in the firſt place, unleſs there are debts due to the queen, wherein ſhe has a prerogative. Cro. E. 793. pl. 37. Mich. 42 & 43 Eliz. C. B. Littleton v. Hibbins.

15. An executor making doubt, whether he ſhould pay *debts before a decree* in Chancery; it was decreed they ſhould be protected. Toth. 152. cites Terry v. Fowler.

S. C. cited by Vaughan Ch. J. Vaugh. 95. Trin. 22 Car. 2. and takes notice that it is left a quære, the judges doubting the caſe; but that the law is ſince taken that the judgment is a good bar to the firſt action. —— Sid. 21. pl. 3. Hill. 12 Car. 2. C. B. Blundevel v. Loverdale, held a good bar to the firſt action.

16. *Debt* was brought againſt an executor *in C. B. for* 100 *l. and pending that action another was brought againſt him in B. R. for* 100 *l. in which he confeſſed the action, and pleaded the judgment in bar to the firſt action, and that plene adminiſtravit all but the ſaid* 100 *l.* The Court inclined that the plea was not good, and that by the firſt proceſs the goods were ſo attached in his hands, that he ought to anſwer that action firſt, and that it was a devaſtavit if he confeſſes any action, and pays any debt after the firſt proceſs and notice of the ſuit. * Quære, for the juſtices doubted. Mo. 173. pl. 306. Mich. 25 & 26 Eliz. Anon.

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17. *Debtor in bonds and ſingle contracts aſſigns lands to ſell in truſt for payment of his debts;* reſolved and declared to be the conſtant rule, that the *creditors ſhould have in proportion*, and not the bonds to be firſt ſatisfied; ſo legatees ſhall have equal proportion pro rata according to the greatneſs or ſmallneſs, for the land is made debtor, &c. but *otherwiſe of judgments*, which affect land by their own ſtrength and nature. 2 Freem. 175. pl. 233. 6 Nov. 15 Car. 2. Woolſton-Croft v. Long.

18. *After ſuit commenced* againſt executor, yet until the executor has *notice* of it he may pay any other creditor, and then plead that he had fully adminiſtered before notice. Went. Off. Ex. 144.

19. *Nor is* the ſheriff's return of ſummons or diſtreſs *ſufficient cauſe of notice;* for the ſummons might be on the land; *but if* it were *to his perſon* it is ſufficient, and then he muſt plead that he was not ſummoned till ſuch a day, before which he had fully adminiſtered. Went. Off. Ex. 144.

20. *And* if the executor is ſued by *latitat* out of B. R. this ſuppoſing a treſpaſs gives no notice of a debt. So alſo of a *ſubpœna* out of the Exchequer. But the *original returnable in C. B.* expreſſeth

preſſeth the debt, and ſo in ſome ſort doth the proceſs thereon. Went. Off. Ex. 144. and ſays, that where ſome books ſeem that if it be *laid in the ſame county where the executor dwells*, he muſt take notice of it at his peril; he takes this not to be law. Ibid. 145.

21. An *action* was brought againſt an *adminiſtrator*, if *pending that* action he *procured another to commence that action* againſt him *for a juſt debt*, due and owing by his teſtator, and *gave way to the plaintiff* in the *laſt action*, to obtain judgment before the other, which judgment he pleaded in the firſt action, and adjudged good, becauſe he hath liberty to pay one debt before another; for though in conſcience all his teſtator's debts ought to be paid, yet there may be ſome *circumſtances* which may make it reaſonable to prefer one creditor before another; as if he is very poor, or one lent his money with, and the other without *uſury*, and in ſuch caſe where the executor conſents to pay him firſt, it ſhall never be intended to be by covin. Sid. 21. pl. 3. Hill. 12 Car. 2. C. B. Blundevill v. Loverdale.

But where debt was brought againſt A. as executor, and pending this action J. S. brought *debt againſt A. as adminiſtrator* for a true debt (*whereas in truth A. was executor*). A. confeſſed the latter action, and pleads this recovery in bar of the firſt action. Reſolved that the plea was not good, the recovery being had againſt him as adminiſtrator. Cro. E. 41. pl. 5. Trin. 27 Eliz. C. B. Anon.

22. No man ever thought it a devaſtavit in an executor to ſatisfy a *judgment obtained upon a ſimple contract, before a debt due by obligation.* Per Vaughan Ch. J. Vaugh. 94. Trin. 22 Car 2.

23. *Debt againſt* S. and D. *executors of G. upon a bond of* 100 *l.* entered into by the teſtator; the defendants *plead, that G. had acknowledged a recognizance in the nature of a ſtatute ſtaple to J. S. for* 1200*l. and that they had not aſſets ultra*; the plaintiff *replied, that D. was bound with the teſtator in the ſaid recognizance*; the defendants demurred; it was argued for them that the recognizance of 1200l. was conceſſerunt ſe & utrumque eorum, ſo that it being joint and ſeveral, the cognizee might elect to ſue either the ſurviving cognizor, or the executors of him who is dead, ſo that the teſtator's goods that are in their hands are liable to this ſtatute; that if the recognizance * were joint, the charge would ſurvive and charge the defendant; that it is common for executors on fully adminiſtered pleaded, to give in evidence payment of bonds, in which they were bound with their teſtator, and ſometimes ſuch perſons are made executors for their ſecurity. The Court were of opinion againſt the plaintiff, and ſo he prayed leave to diſcontinue, and had it. Mod. 165. pl. 3. Mich. 25 Car. 2. C. B. Rogers v. Danvers.

Freem. Rep. 127. pl. 140. S. C. reſolved accordingly upon the difference of a joint obligation and a joint and ſeveral obligation, and agreed that defendant may pay this debt out of the eſtate of the teſtator, and plead it to the other creditors. But they agreed that if the ſtatute had been only joint, or if it had been a joint obligation, there the ſurvivor muſt be charged out of his own eſtate, and the executors of the perſon dead are not chargeable; and reſolved that the recognizance was joint and ſeveral, and ſo judgment for the defendant.

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24. *Deviſe of lands to his brother charged with the payment of* 600*l. at ſuch a time, and in default thereof the teſtator deviſed the lands to another*; the *brother and the other deviſee joined in a mortgage of* theſe lands, and the *mortgagee ſuffered the mortgagor to continue in poſſeſſion, and to fell timber, ſo that there was not ſufficient to ſatisfy the ſaid* 600*l. and the mortgage*; decreed that the 600l. ſhall be paid before the mortgage,

mortgage, becauſe the mortgagor had notice of this will. Fin. Chan. Rep. 225. Trin. 27 Car. 2. Green v. Gardner.

25. A *bond* was *in quadraginta libris, conditioned for the payment of* 180 *l.* The Court *decreed this to be good pro quadrigentis,* by reaſon of the greatneſs of the ſum expreſſed in the condition; *and that it ſhould be ſatisfied by the executor before any bond that judgment was not obtained upon before the day of pronouncing the decree; but* the Court admitted that *judgments upon bonds obtained after the ſubpœna, and before the decree, ſhould be preferred* before it, though the contrary was preſſed. 2 Freem. Rep. 16. pl. 14. Hill. 1676. Anon.

S. C. cited Vern. 490. by the name of Phillips and Creech as adjudged accordingly. And Ibid. Mich. 1687. S. P. held accordingly in caſe of Willet v. Earl. —— S. P. adjudged per tot. Cur. for the plaintiff in C. B. and affirmed in B. R. Per totam Curiam, and they held that the contract remained in the realty, notwithſtanding that the term was determined. 3 Lev. 267. Paſch. 2 W. & M. Newport v. Godfrey. — 2 Vent. 184. S. C. ſays, it appeared by the declaration that the leaſes (there being ſeveral) ended in the life of the leſſee. And adjudged in C. B. for the plaintiff, and affirmed in B. R. —— 4 Mod. 44. S. C. ſtated accordingly, and judgment in C. B. for the plaintiff, and affirmed in B. R. —— Comb. 183. Godfrey v. Newport, S. C. in B. R. the Court held that the rent being in the realty is of as high a nature as a bond, for no wager of law lieth. —— But the Court was unanimouſly of opinion that debts due for rent on leaſe by deed and debts on bond are in equal degree, and that leaſe by deed and a parol leaſe in this caſe are the ſame. Carth. 511. Hill. 11 W. 3. B. R. Gage v. Aſton. —— 1 Salk. 326. S. C. & S. P. —— Nelſ. Ch. Rep. 191. Anon. S. P. —— And per Holt Ch. J. Newport and Godfrey's caſe does not contradict this, it was debt for rent upon a parol leaſe; defendant pleaded ſuch a debt upon obligation ultra quod he had not aſſets; for being in equali gradu, he could not plead the one againſt the other till judgment or payment, then the other, and there is no diverſity, becauſe debt in the realty without ſpecialty as to equality of degrees. 12 Mod. 291. in caſe of Cage v. Aſton. —— Adjudged in C. B. and affirmed in error in B. R. 4 Mod. 45. —— Debt for rent ought to be paid before all other debts. Per Croke J. Bulſt. 23.

26. The queſtion was, *whether rent due upon a leaſe parol, paid by an executor, ſhould be good diſcharge to him againſt an obligation of the teſtator's?* It was objected, that debts by ſpecialty are of an higher nature than debts without ſpecialty; and therefore the executor, having paid this rent, which was not due by ſpecialty, had paid it in his own wrong, ſo long as there were debts owing upon ſpecialty. But the whole Court were of opinion that it was well enough; and that rent, though it be upon a leaſe parol, is of as high a nature as an obligation; and 11 H. 4. it was held, that an obligation taken for rent did not extinguiſh the rent, and the Ch. J. ſaid, he had adviſed with Serjeant Maynard, who told him that it was always held ſo in the Weſtern circuit, and allowed to be given in evidence upon fully adminiſtered; and ſo judgment was given pro def. Freem. Rep. 262. pl. 283. Mich. 1679. Phillips v. Lee.

[ 290 ] 27. The executors of F. preferred a bill againſt all the creditors, ſome being by judgment, ſome by bond, and ſome by ſimple contract; the teſtator having *deviſed lands to the executors for the payment of his debts,* and he had *in the firſt place deviſed an annuity of* 50 *l. per ann. to be paid to his wife.* My Lord Chancellor directed, firſt, that the lands being deviſed to his executors, it ſhall be conſtrued that the teſtator intended that they ſhould be paid in the ſame order as the law directs, that is to ſay, that the debts ſhould be firſt paid before this annuity, which was but a legacy let the wording of the will be how it will; although it deviſed the lands charged with this annuity for the payment of debts, yet the debts ſhould have the preference; but he held, that the debts of all kinds,

kinds, whether by judgments, bonds, or ſimple contract, ſhould be ſatisfied pari paſſu, and if the value of the land fell ſhort, then that they ſhould be ſatisfied in proportion, only *judgments that did affect the land without any ſuch deviſe were to have the preference; but a debt by a decree in Chancery ſhould be put in equal degree with debts by bond or contract*, becauſe that doth not bind the land until ſequeſtration. But ſo far as the perſonal eſtate did extend, he ordered that the debts ſhould be paid in that order as the law did direct, and there a debt by a decree in Chancery ſhould have the preference of a bond. And the caſe of Hickſon and Witham was cited. 2 Freem. Rep. 49, 50. pl. 54. Hill. 1679. Foly's caſe.

28. Ordered, that a *decree* ſhould precede debts on ſimple contract and bonds, and *take place next to judgments*. And the caſe of Parker and ——— was cited, where it had been ſo reſolved; and as to the objection, that in debt upon a bond at law an executor could not defend himſelf, by pleading he had no aſſets ultra what would amount to ſatisfy the decree, it was anſwered, he might defend himſelf by a bill in this court, which would take care to protect him therein. Vern. 143. pl. 137. Hill. 1682. Harding v. Edge.

A decree for payment of money ſhall be preferred to a bond creditor, as to the perſonal eſtate againſt the executor, but as to the heir the decree is no lien. Paſch. 1726.

29. The *lading of the ſhip*, in conſtruction of law, *is tacitly obliged for the freight*, the ſame being, in point of payment, preferred before any other debts to which the goods ſo laden are liable, though ſuch debts as to time were precedent to the freight; for the *goods remain* as it were *bailed* for the ſame, nor can they be attached in the maſter's hands, (though vulgarly it is conceived otherwiſe). Molloy, 258.

30. *B. was indebted to A. his brother in 50l. on ſimple contract. A. died, leaving two ſons; and by will left an allowance of 25l. a year for their education, and made J. S. his executor. B. agreed with J. S. to educate them at a lower rate*, and *they continued with him three years*, when *B. died*, and left his wife executrix. *Decreed, the executrix to diſcount the 50l. and that it ſhould be no devaſtavit, though bond debts owing by her huſband ſhould afterwards be put in ſuit againſt her*, and that if any judgment ſhould be recovered againſt her as for a devaſtavit, this Court will protect her. Nelſ. Chan. Rep. 158. Hill. 1 W. 3. Berriſte v. Berriſte.

31. A *deviſe to truſtees for payment of debts and legacies*, and the *truſtees are made executors*; the eſtate falls ſhort; the *debts muſt be paid firſt*, becauſe the truſtees being made executors, the money is legal aſſets. 2 Vern. 248. pl. 233. Mich. 1691. Greaves v. Powell.

32. *Debt on bonds for payment of ſums certain*, to be *preferred* in payment *to demands on articles ſounding in damages*. 2 Vern. 272. pl. 257. Trin. 1692. Whitchurch v. Baynton.

33. A *decree* was had *againſt the defendant's inteſtate*, by the plaintiff, *for 400l. for the profits of land received by him*, and *the inteſtate, before the ſaid decree, was indebted to the defendant by bond*. The *in-* [ 291 ]

*teſtate dying, the defendant got adminiſtration*, and the queſtion was, whether the defendant could retain to ſatisfy his own bond againſt this decree, there being no aſſets to ſatisfy both? And held by Atkins, Turton, and Lechmere, that he might, and thereupon decreed, that the defendant ſhould pay the plaintiff, in caſe he had aſſets, in the firſt place. Powell dubitavit, for that in caſe the party was ſued at law for debt upon a bond, he could not plead, nor give this decree in evidence at law to bar the plaintiff, and ſo it would be one way at law, and another way here; but for that it was anſwered, that the party might be relieved by his bill in equity, and have *an injunction*. Freem. Rep. 333, 334. pl. 414. Paſch. 1693. in Scacc. Staſby v. Powell.

34. A man *deviſed lands to A. and B. in truſt to be ſold for the payment of his debts, and makes the ſame perſons executors*; and the only queſtion was, whether bond debts ſhould have a preference, or all debts be paid pari paſſu? The difference was taken, when the ſame perſons that are truſtees to ſell the lands are executors likewiſe, and where not; for in the former caſe, after the land is ſold, it is aſſets, even at law, and therefore to decree them to pay otherwiſe than according to the legal courſe, would be to decree a devaſtavit. Lord Keeper took time to conſider of it, and afterwards delivered his opinion, that *bond debts muſt be preferred*; and the 23 December 1700, at Powis-houſe, in the caſe of BICKMAN v. FREEMAN, was a like decree and difference. Chan. Prec. 127. pl. 113. Mich. 1700. Cutterback v. Smith.

35. A. treats for a purchaſe with B. and the *lands to be purchaſed were incumbered with mortgages and judgments*; the *purchaſe-money being agreed, was returned to London, and placed in an indifferent hand, to be paid in diſcharge of theſe incumbrances when the quantum of them ſhould be adjudged, and aſſignments made; but before that was done, the purchaſor died*, and did *not leave ſufficient aſſets to pay his debts upon bond*. The queſtion was, whether the money depoſited as aforeſaid ſhould be aſſets of the purchaſor, and be applied to pay his debts, or muſt be applied to pay off the real incumbrances on the purchaſed eſtate? for if it were to be applied to pay off theſe incumbrances, then the creditors of the purchaſor muſt loſe their debts; but if otherwiſe, then the mortgagees, &c. would be paid out of the land by virtue of their ſecurities, and the creditors would have their ſatisfaction out of the money, and ſo all might be paid. Lord Keeper was of opinion, that *the money was bound by the agreement, and muſt be applied to pay off the incumbrances*. Chanc. Prec. 174. pl. 145. Mich. 1701. Farr v. Middleton.

36. If a man *recovers judgment* or ſentence *in France for money due to him*, the debt muſt be conſidered here only as a debt on ſimple contract, and the ſtatute of limitations will run upon it. 2 Vern. 540. Hill. 1705. Duplein v. De Roven.

37. The *creditors* of J. S. *exhibited* a *bill in Chancery for debts on mortgages, judgments, and bonds. Upon one of the bonds the defendant was outlawed, and upon one of the judgments the recoveror had brought an action of debt, and the queſtion being, which of theſe debts ſhould be firſt paid, it was argued that the judgments were by confeſſion, and it*

*was*

*was not equitable that it ſhould be in the power of the party to prefer one creditor to another;* but that ſeemed to be over-ruled; and as to the *outlawry*, the Court ruled, that that *being only upon meſne proceſs, did not alter the nature of the debt, nor create a lien on the land in this caſe; but that where there is an outlawry, and a ſeiſure thereupon, the debt attaches upon the land, and ſhall be preferred to a judgment, though prior to the outlawry*, but it is the ſeiſure that gives the preference. 1 Salk. 80. pl. 1. Trin. 1714. in Canc. Erby v. Erby. [ 292 ]

38. *Bringing debt upon a judgment does not poſtpone it to other judgments*, and it is the act of the attorney, and would be no waiver, becauſe there was no other remedy after the year and day at common law; per Curiam, in anſwer to an objection, that it was a waiver of the lien created by that judgment, for that the land, which the party had at the time of the later judgment, was only extendible. 1 Salk. 80. pl. 1. Trin. 1714. in Canc. Erby v. Erby.

39. The grantor's *covenant in a marriage-ſettlement for him and his heirs, that the premiſes were free from incumbrances*, ſhall *come in with creditors equally on bond;* per Cowper C. Paſch. 1715. Parker v. Harvey.

40. A. died *indebted by mortgage and ſimple contract. One of the ſimple contract creditors gets judgment of aſſets quando acciderint.* The *executor applies the aſſets to pay off the mortgage.* The ſimple contract creditors ſhall ſtand in the place of the mortgagee as to what he exhauſted out of the perſonal aſſets; and this being only by the aid of equity, all the ſimple contract creditors ſhall come in equally with the creditor who got judgment. 2 Vern. Rep. 763. pl. 663. Mich. 1718. Wilſon v. Fielding, alias Hillerſden v. Fielding.

41. A *leaſe for years, or a bond* or a *grant of an annuity taken in a truſtee's name*, being perſonal aſſets, *ſhall be applied in a courſe of adminiſtration*, and not for the payment of all the debts equally. Adjudged. Ibid. 764. in S. C.

One poſſeſſed of a term for years mortgages it and dies, leaving debts, ſome by bond, and ſome by ſimple contract. The equity of redemption is equitable aſſets, and ſhall be liable to all the debts equally. 3 Wms.'s Rep. 341. pl. 89. Mich. 1734. Cox's caſe.

But where a bond is due to A. but taken in the name of B. in truſt for A. and A. dies, this muſt be paid in a courſe of adminiſtration. So if a term for years be taken in the name of B. in truſt for A. this, on the death of A. the ceſtuy que truſt will be legal aſſets; for here the right to the thing is plain, and if the truſtee conteſts it, he muſt prima facie do it on the peril of paying coſts. Per the Maſter of the Rolls. 3 Wms.'s Rep. 342, 343. Mich. 1734. Cox's caſe.

The order which executor is to obſerve, is to diſcharge, 1ſt, funerals; 2dly, debts of the king; 3dly, rents upon leaſes for years; 4thly, judgments; 5thly, ſtatutes and recognizances; 6thly, obligations; 7thly, contracts; 8thly, legacies. The non-obſervance of this rule expoſes the executor to a devaſtavit, which is pro tanto to anſwer of his proper goods. Jenk. 274. pl. 94. —— A judgment is higher than a recognizance or ſtatute, for a recognizance is but an aſſurance by conſent of the parties, and is but a bond recorded, and there is no reaſon that an executor by bringing a writ of error ſhould make the judgments to come after the ſtatute, and therefore an execution upon a ſtatute ſo obtained ſhall not prejudice it; but afterwards upon conferring with other juſtices it was adjudged for the defendant the executor, that the ſatisfying the debt upon the ſtatute was not any devaſtavit becauſe he could not withſtand it, and he ſhall not be put to his audita querela. Cro. E. 822. Bearblock v. Read. —— A recognizance is a record, but inferior to a judgment. Per Cur. 11 Mod. 223. (And Holt Ch. J. called the recognizances a pocket record.) Buſton v. Ridgley. —— S. P. per Coke Ch. J. 2 Buſt. 65. in caſe of Weaver v. Clifford. —— Went. Off. Executors, 135. places judgment next after debts of the king. And page 14 & 15. conceives no priority between debt by bond and debt for rent or damages on a covenant broken. —— Went. Off. Executors, 138. takes notice that he finds no difference of priority between recognizances and ſtatutes, yet he ſays that one reaſon given for preferring judgment

to ſtatutes in HARRISON'S CASE, viz. that the one remains a record upon the roll of the Court; whereas the other being only a pocket record, is more private, and that this ſhould give priority alſo to recognizances before ſtatutes; and further ſtatutes are not properly records but obligations recorded. And the executor may ſatisfy the ſtatute before the recognizance if he do it before execution ſued thereupon, for being in equal degree, he has election to prefer which he will; nor does the antiquity of either as being more old than the other, and the like between one ſtatute and another, give any advantage as to the goods, but he that firſt gets his execution ſerved ſhall have the preference, though otherwiſe as to the lands. Ibid. 139.

Where an obligor entered into a recognizance in nature of a ſtatute, and judgment againſt him upon the bond, and then he died, his executor paid the creditor upon the ſtatute, and to a ſcire facias on the judgment he pleaded payment of the recognizance & bene, for he is not bound to take notice of the judgments againſt the teſtator without being made acquainted therewith by the creditors, for he is no ways privy to his acts. 2 And. 159. in pl. 87. Paſch. 42 Eliz. Anon.

[ 293 ] 42. The late earl of Winchelſea *died ſeiſed of ſome lands in fee, and conſiderably indebted by judgment and ſimple contract, and after the death of the ſaid earl, and before the eſſoin day of the next following term, many of the judgment creditors delivered fieri facias's to the ſheriff, and took the goods and* furniture *in execution*, whereupon *the ſimple contract creditors petitioned* (for it did not come before the Court upon a bill) *that the judgment creditors might be paid out of the land*, or at leaſt, *that as to ſo much as the judgment creditors had by taking it from the perſonal eſtate exhauſted the ſame, they (the ſimple contract creditors) might ſtand in their place, and be paid out of the land.* Sed per Cur. this rule of equity is very juſt, but not applicable to the preſent caſe; here the judgment creditors having lodged their writs of execution with the ſheriff in the ſame vacation that the party died, it relates to the teſte of the writ as to all but purchaſors, and conſequently by relation the perſonal eſtate, of which the ſimple contract creditors would avail themſelves, as being in the poſſeſſion of the earl at his death, was not ſo, being evicted from him in his life-time by the execution, and therefore the ſimple contract creditors ſeem to be without remedy as to ſuch of the aſſets as have been ſeiſed by theſe executions; per Lord Parker. 3 Wms.'s Rep. 399, 400. Hill. Vac. 1719. in a note there by the reporter cites Finch v. the Earl of Winchelſea; but the reporter ſays quære.

43. Appeal from a decree of the Rolls upon this caſe, *Martin, a fellow* of Greſham college, and a fellow likewiſe *of a college* in Cambridge, *by a note directed to the defendant his executor, taking notice that he was indebted to the plaintiff in the ſum of* 80*l. deſires the debt ſhould be paid out of what ſhould be due to him from the college as* fellow *at the time of his death, and out of what might be raiſed by the ſale of his furniture of his chambers at the time of his death.* Quære, if this note of directions to his executor doth create a ſpecific lien of theſe things in favour of the plaintiff to give her the preference to other creditors? King C. ſaid *this is no ſpecific lien* upon theſe particular things, but the note is fraudulent as to other creditors, and the plaintiff ought to prove her debt and come in as other creditors in equal degree; if ſuch notes ſhould give a preference to debts by ſimple contract, juſt creditors by ſpecialty or record might be ſtripped of their debts, and the plaintiff in this caſe *ought to come in only as a creditor by ſimple contract*, without any performance upon account of this note; but the plaintiff agreeing to accept the

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ſum offered by the defendant's anſwer, it was decreed by conſent. MS. Rep. Trin. 12 Geo. Canc. Hudſon v. Martin.

44. *Debt upon an obligation* was brought againſt the defendant as executor. The defendant *pleads a recovery againſt him* already had *in placito debiti, and that he had notice of this bond at that time, and that there was no more in his hands than would ſatisfy this recovery.* Upon which the plaintiff demurs. The Ch. J. ſaid he was of opinion, that the defendant's plea might well be underſtood of a recovery in debt upon bond, or other matter of as high nature, and if ſo it was beyond queſtion that the plaintiff ought to be barred; but, however, the Court unanimouſly agreed, that if the plea was to be underſtood of a recovery upon ſimple contract, the recovery would be a good bar, as the defendant had no notice of the obligation. In this, they ſaid, conſiſts the *difference between duties of a private nature, and duties upon record;* for thoſe the Court did allow that executors are bound to take notice of at all events, but theſe they need not, where a ſuit is commenced againſt them to recover debts of an inferior nature. However the Court did allow, that if an executor makes a voluntary payment of a debt by ſimple contract where there are not aſſets to ſatisfy the [ 294 ] bond debts, it is otherwiſe, though he has no notice; for there are many caſes where a man's voluntary act ſhall prejudice him, where the neceſſity of law would not. Upon the whole, judgment was given for the defendant. Barnard. Rep. in B. R. 186. Trin. 2 Geo. 2. Paterſon v. Hudleſton.

45. All *executors ſhall be preſumed to take notice of all judgments even in the inferior courts* of law, and therefore are not to pay bonds before ſuch judgments but at their peril. 3 Wms.'s Rep. 117. pl. 26. Trin. 1731. in Herbert's caſe.

46. Any *voluntary bond is good againſt an executor* or adminiſtrator *unleſs ſome creditor be thereby deprived of his debt;* indeed, *if the bond be merely voluntary, a real debt, though by ſimple contract only, ſhall have the preference,* but if there be no debt at all, then a bond, however voluntary, muſt be paid by an executor. 3 Wms.'s Rep. 222. Mich. 1733. in caſe of Lechmere v. Charles Earl of Carliſle.

47. *A. and B. are partners in trade; A. gives a bond to leave his wife* 1000*l. A. dies, the other partner adminiſters;* if the wife would be paid out of the ſeparate eſtate of A. on there being effects, ſhe ſhall have a preference before other creditors; but *if there is no ſeparate eſtate, and the wife would have ſatisfaction out of the partnerſhip effects, then all the partnerſhip debts muſt be firſt paid.* 3 Wms.'s Rep. 182. Paſch. 1733. in caſe of Croft v. Pyke.

48. *One poſſeſſed of a term for* 1000 *years, articles to purchaſe the inheritance, and by will gives* 3000*l. to his daughter, and makes his ſon executor and dies The ſon aſſigns the term in truſt to attend the inheritance,* of which he *takes a conveyance in his own name.* Afterwards the *ſon acknowledges a judgment to A. and mortgages the ſame lands to B. and dies inſolvent.* A. ſhall firſt be paid his judgment, then B. ſhall be paid his mortgage, and then the daughter (being adminiſtratrix to her brother) is intitled to her legacy of 3000*l.* in preference

ference to the ſimple contract creditors. 3 Wms.'s Rep. 328. Mich. 1734. Charlton & al' v. Low.

If ſuch bond had been given to the ſecond wife as a recompence for the injury done her, and thereupon ſhe had left A. it had been a good bond and to be paid before any ſimple contract debts.

49. A. *having a wife who lived ſeparate from him,* afterwards courted *and married another* woman, *who knew nothing of the former wife's being alive; but it being diſcovered* to the ſecond wife that the former was alive, *A. in order to prevail with the ſecond wife to ſtay with him, ſome years afterwards gave a bond to a truſtee of the ſecond wife, to leave her* 1000*l. at his death, and died not leaving aſſets to pay his ſimple contract debts;* if this bond had been given immediately on the diſcovery, and they had parted thereupon, it had been good, but being given in truſt for the ſecond wife after ſuch time as ſhe knew the firſt wife was living, and to induce her to continue with A. this was worſe than a voluntary bond, and *decreed to be poſtponed to all the ſimple contract debts.* 3 Wms.'s Rep. 339. pl. 88. Mich. 1734. Cox's caſe.

3 Wms.'s Rep. 349. in S. C.

50. If a *ſimple contract creditor, on behalf of himſelf and the reſt of the creditors,* were to *bring a bill and obtain a decree, that he and the reſt of the creditors ſhould come in before the maſter and be paid all their debts,* and that an advertiſement be put in the Gazette for that purpoſe; here any *bond creditor coming on the foot of the decree, ſhall be paid only pro rata with the ſimple contract creditors;* for his coming in implies a ſubmiſſion to the decree. And this was thought to be clear. 3 Wms.'s Rep. 343. Mich. 1734. in caſe of the creditors of Sir Charles Cox.

51. *But if ſuch bond creditor would lie by, having notice of the decree and advertiſement in the Gazette,* (notwithſtanding every one is in many caſes obliged to take notice of a lis pendens,) *and after* ſuch lying by, *ſhould bring his action at law againſt the executor* or adminiſtrator of the obligor, though at law the latter may not be able to defend himſelf; yet his honour thought that in this caſe an equity would ariſe in favour of ſuch executor or adminiſtrator, and of the ſimple contract creditors, to compel the bond creditor to come in and accept of a proportion of his debt rateably with the ſimple contract creditors. But however ſtrongly his honour inclined to be of this opinion, he ſaid it was no part of his judgment; nevertheleſs, he declared he ſhould always do his utmoſt to extend the rule of diſtributing equitable aſſets equally among all creditors. 3 Wms.'s Rep. 343, 344. Mich. 1734. Sir Charles Cox's caſe.

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52. If a man *deviſes his lands to truſtees to pay all his debts, and dies indebted by ſpecialty and ſimple contract, and the bond creditors recover part of their debts out of the perſonal eſtate, and afterwards* they *apply to be paid the reſt of their bond debts out of the real eſtate* deviſed for that purpoſe; in this caſe as the teſtator intended all his creditors ſhould be equally paid their debts, the bond creditors ſhall not come in upon the land, until the ſimple contract creditors have received ſo much thereout, as to make them equal and upon the level with the bond creditors, in reſpect of what they received out of the perſonal eſtate; and this the Lord Chancellor ſaid was what

what the Maſter of the Rolls had very rightly decreed on great conſideration. 3 Wms.'s Rep. 323. Trin. 1734. in caſe of Haſlewood v. Pope.

## (Q. a. 2) What Debts ſhall be firſt paid in reſpect of Actions commenced.

1. EXecutors may pay debts and other creditors *pending a writ* againſt them, *if they have not notice of it*, but *not after notice*, and the aſſets ſhall charge them. Br. Executors, pl. 43. cites 2 H. 4. 21. Br. Adminiſtrators, pl. 52. cites S. C.

2. *And* where *writ abates*, and *they have aſſets the day of the firſt writ purchaſed*, they ſhall be by this *charged in the ſecond writ*. Br. Executors, pl. 43. cites 2 H. 4. 21. And yet the plaintiff did not ſhew for what cauſe the firſt writ abated, whether in his own default or not, and yet the plea awarded good enough, per tot. Cur.; quod nota; and yet it was not ſaid that the ſecond writ was brought by journey's Accounts, and the defendant compelled to reply to it; and the plaintiff ſhewed the teſte of his firſt writ, and that the defendant had aſſets the day of the firſt writ purchaſed, viz. the 14th day of January anno firſt of the now king, by which the defendant ſaid that plene adminiſtravit the day of the firſt writ purchaſed; and the plaintiff ſaid that the teſtator enfeoffed the defendant upon condition that if he returned from beyond ſea, that then to re-infeoff him or otherwiſe to ſell the land, and to diſtribute the money for his ſoul, and you ſold it for 200 marks, which you had in your hands the day of the writ purchaſed; by which the defendant ſhewed a ſchedule of the debts; and becauſe he had not notice of this ſuit till Oct. Mich. and at the pluries capias he came and pleaded to the writ, as appears there, and ſaid that the writ of debt was brought in Middleſex, and he is dwelling continually in London, and he had fully adminiſtered the 200 marks before he had notice of the ſaid writ purchaſed; priſt, &c. And Rickhill for the defendant ſaid, that he did well before notice, &c. By which the other ſaid, that he ſuch a day in S. gave him notice, which day he had aſſets, and the other that he had nothing in his hands after notice, priſt, and the other e contra. And per Rickhill, this matter does not prove aſſets of the money of the late; for theſe were not the monies of the teſtator; and if he had died inteſtate, the ordinary could not demand account of it. But Markham J. contra; becauſe the money ſhall be received to his uſe, and by his executors to diſtribute for his ſoul, which cannot be better employed than in payment of debts. Br. Aſſets enter mains, pl. 4. cites S. C.

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3. *Judgment upon judicial proceedings* in the court of the king, is preferable to a *ſtatute* or *recognizance*, though the recovery be puiſne to the debt due by recognizance or ſtatute. 4 Rep. 59. b. cites in the caſe of the commonalty of ſadlers. Paſch. 32 Eliz. Rot. 235. C. B. as the caſe of Pemberton v. Barham. 5 Rep. 28. b. Harriſon's caſe.— 6 Rep. 45. b. in Higgin's caſe.— Yet if the executor pays the recognizance before notice of the judgment, he may well plead it, for he is not bound to take notice of judgments againſt the teſtator, without being acquainted therewith by the creditors, he being not privy to his acts. 3 Mod. 115. Trin. 2 Jac. 2. B. R. Harman v. Harman.

4. Debts *to the crown* are to have the precedence in payment. Went. Off. Ex. 132.

5. *But* this is to be underſtood only of debts by or *upon record*, and not of debts otherwiſe due to him. Went Off. Ex. 132.

6. *As* money due for *woodſales*, or *ſales of tin*, or other minerals, for which no ſpecialty is given, ſo alſo for *amercements in his courts not of record*, as courts of honour, and courts baron; ſo of *fines for copyhold eſtates* there, ſo of *money for which ſtrays* coming into the king's manors are ſold; ſo of *debts by bond, &c. forfeited by outlawry*, &c. or arrears of rent ſo forfeited are not debts of record But fines and amercements in the king's courts of record are debts of record with-

out doubt. Went. Off. Ex. 134, 135. cord until office found, and ſo not to have priority. Went. Off. Ex. 133.

——Arrears of fee farm rents, or other rents of inheritance, are not debts of record, as it ſeems. Went. Off. Ex. 134.

3 Lev. 355. that it is equal to a judgment at common law. Shafte v. Powel in Scacc. 7. *Decree in Canc. againſt an executor* ſhall not be ſatisfied before a *bond*, it ſhall take place next to judgments made by teſtator, and become due after his death. Per Roll J. Sty. 38. Trin. 23 Car. in caſe of Eeles v. Lambert.

——Ch. Prec. Biſhop v. Godfrey. ——Debt by a decree ſhall be paid after judgments, and before debts by bond. Vern. 143. pl. 137. Hill. 1682. Harding v. Edge.

3 Mod. 115. in caſe of Harman v. Harman.—Gibb. 76. Davis v. Monkhouſe. 8. It is a devaſtavit to pay voluntarily a debt by ſimple contract before a debt due by obligation whereof he had notice, not otherwiſe. But no man ever thought it a devaſtavit in an executor to ſatisfy a judgment *on ſimple contract* before a bond debt; per Vaughan Ch. J. Vaugh. 94. Trin. 22 Car. 2. C. B. Edgecomb v. Dee.

9. It is a devaſtavit in executor to ſatisfy a debt on *bond* before a *judgment on ſimple contract*, and ſo it is to ſatisfy *any latter judgment* if there be no aſſets to ſatisfy a *former* alſo; (cites 5 H. 7. 27. 8. Mo. 678. Starie's caſe. Cro. E. 462. Green v. Wilcocks;) per Vaughan Ch. J. 95. Edgecomb v. Dee.

But even in the caſe of a voluntary payment if the ſuit at law be not by original; but for the purpoſe by a latitat out 10. After a *ſuit begun* the executor may not excuſe himſelf by any voluntary payments, he may uſe *legal delays* as imparlance and eſſoins, &c. to *prefer one creditor* before another, but he may not do it by *falſe pleading* of what lieth in his own knowledge; otherwiſe if falſity lies not in his own knowledge as non eſt factum teſtatoris. 2 Ch. Caſes, 201. Mich. 26 Car. 2. Parker v. Dee. S. C. cited. 2 Vern. 62. Per Cur.

of the King's Bench, there a voluntary payment ſhall ſtand good after the action brought. 2 Vern. 300. Trin. 1693. Goodfellow v. Burchet. —— But an executor moving the Court for enlargement of time to plead, (the rules being out,) was denied unleſs he would enter into a rule not to plead any judgments obtained againſt him after the rules were out. 8 Mod. 308. Mich. 11 Geo. Anon.

If executor is ſued at common law, and after an original pay a debt of the ſame nature without notice of the original, he is excuſed. 2 Chan. Caſes, 116. Trin. 34 Car. 2.

Where creditors bring a bill, and make the executors and all other creditors parties, the executors ſhall not have the power by confeſſing or ſuffering judgment by default after the bill exhibited, to prefer one creditor to another. Per Maſter of the Rolls. 2 Vern. 62. Paſch. 1688. cites Parker v. Dee.

* If an executor be ſued, and after an original, gives notice, yet the defendant may confeſs the action to another creditor, if there be no fraud; adjudged. Cart. 228. Trin. 23 Car. 2. C. B. Meller v. Overton executor of Corbet.

The adminiſtrator may according to law prefer himſelf as far as the perſonal eſtate goes, but no farther, though lands are deviſed for payment of debts. 2 Chan. Caſes, 55. Trin. 33 Car. 2. Geal v. Adderly.

If an executor pays debts on ſimple contract, or ſuffers judgment to paſs againſt him in ſuch actions, he may plead ſuch payment or judgment in bar to an action on a bill of exchange. 3 Salk. 164. pl. 10. Yeoman v. Bradſhaw.——Cumb. 392. S. C.

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A man deviſes lands to be ſold for payment of his debts, and makes the deviſees executors; 11. Generally *where lands are deviſed for payment of debts*, there all ſorts of ſecurities, whether ſtatutes, judgments, bonds, or ſimple contract debts, if they do not in their own nature affect the land ſo deviſed (as a judgment cannot, if the land be then in mortgage or the like), there *all debts ſhall be paid in proportion, and by average*, and ſo of other equitable incumbrances; but then there is this *difference*,

*ence, if the deviſee of lands in truſt for payment of debts be alſo made executor*, then do the lands ſo deviſed become legal aſſets, and *then debts muſt be paid according to their precedency or ſuperiority at common law*; and ſo it was reſolved in the caſe of Hixine v. Mortley, which was agreed to be law of all ſides. Vern. 64, 65. pl. 60. Mich. 1682. Girling v. Lee.

and the queſtion was, whether the debts ſhould be paid in proportion, or according to the courſe

of adminiſtration? My Lord Keeper having taken time to conſider till this day, now delivered his judgment, that they muſt be paid in a courſe of adminiſtration, becauſe where the ſame perſon is executor and truſtee, the land when ſold is legal aſſets; otherwiſe when the truſtee is executor, there they ſhall be paid in proportion. Chanc. Prec. 136. pl. 119. Mich. 1700. Bickham v. Freeman.

12. *Judgments* attach lands according to *priority of originals*. 2 Ch. R. 145. 30 Car. 2. Gray v. Colvill.

13. A man poſſeſſed of a term for years makes a *mortgage* of this term to J. S. and afterwards acknowledges a *ſtatute* to B. and then confeſſes a *judgment* to C. The judgment muſt be preferred in a courſe of law to the ſtatute. Vern. 293. pl. 286. Hill. 1684. Morgan v. Ld. Sherard.

14. After *a ſuit commenced in Canc.* an executor ſhall not be allowed any payments made *voluntarily* without ſuit; per Jeffries C. Vern. 369. pl. 362. Hill. 1685. Bright v. Woodward.

Unleſs they are of a ſuperior nature, and even in the

caſe of a bond fraudulently cancelled, and for relief whereon a bill is brought, the plaintiff ſhall have the ſame benefit as if it had not been cancelled, and this was in the caſe of a bond by the huſband to the wife, before marriage, to leave her 6000l. ſhe having brought him ſo much. Fin. Rep. 184. Mich. 26 Car. 2. Brown v. Savage.

15. A *judgment in a piepowder court* will oblige the priority of payment before bonds by executors; per Ld. C. 2 Vern. 89. Mich. 1688. in caſe of Searle v. Lane.

16. An adminiſtrator paid money on *ſpecialties without notice of money decreed*, and had fully adminiſtered the aſſets. Decreed nevertheleſs that he pay the money decreed. 2 Vern. 37. pl. 31. Hill. 1688. Searle v. Hale.

Ibid. 88. Searle v. Lane, S. C. and the Court confirmed the

former decree.——2 Freem. Rep. 103. pl. 114. S. C. decreed for the plaintiff; but if the decree had only been to account, and had not aſcertained the ſum, it had been no more than a judgment quod computet at law, which is no complete judgment till the account ſtated. This cauſe was reheard in term' Paſchæ 1649, before the Lords Commiſſioners, who took time to conſider of it; and the reporter ſays, quære how determined.——Equ. Abr. 332. pl. 4. cites S. C. decreed. Hill. 1688.

An executor paid money purſuant to a decree of this Court, and upon a plene adminiſtravit they would not permit him to give any payment in evidence at law, this Court decreed it ſhould be allowed, and referred the matter to an account here. 2 Vern. 57. Arg. cites Paſch. 1667. Jones v. Bradſhaw, S. P.

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17. *Judgment precedent to a ſtatute* from A.—A. dies. *A writ of error* is brought on the judgment, and pending that writ the money due on the ſtatute is paid, and not enough left to ſatisfy the judgment creditor, it has been ſaid that the firſt payment to the conuſee is good, becauſe by the writ of error the execution of the judgment was ſuſpended; per Cur. 4 Mod. 247. Mich. 5 W. & M. in B. R. in the caſe of Dighton v. Greenvill.

If after the death of teſtator execution upon the ſtatute be taken out, executor may plead it to a ſci. fa. upon

judgment, becauſe he could not hinder execution; per Holt Ch. J. 6 Mod. 144. in caſe of Smith v. Harman, cites And. 208, 209. that ſuch payment is good.——Per Holt. Farr. 140. Anon. cites Yelv. 29. the Court was divided; but upon the reference to the other juſtices, the major part held the payment good. Read v. Bearblock.——Skinn. 388. S. C. cited by Holt Ch. J. and ſaid, that this ſhews

ſhews that the writ of error had ſo totally ſuſpended the effect of the judgment, that it ſhall not have any regard or effence.

2 Chan. Caſes, 201. Parker v. Dee, contra Mich. 26 Car. 2. —— Payment on a recovery at law on action brought after the bill was depending in Chancery was diſallowed after great debate. Arg. Chan. Prec. 188. cites Joſeph v. Mott, but Ld. Wright diſapproved that caſe, but decreeing according to that caſe, his decree was reverſed in the Houſe of Peers, and the payment of a bond voluntarily, without confeſſing judgment after a bill brought by grantee of a rent-charge againſt the executor, was allowed there. Chan. Prec. 188. Hill. 1701. Darſton v. Earl of Orford.

16. After a *bill in Canc.* by one bond creditor againſt the executor, the executor *confeſſes a judgment to another* bond creditor. The Court allowed the payment on the judgment confeſſed after the bill brought. 2 Vern. 299. Trin. 1693. Goodfellow v. Burchet.

A ſimple contract creditor brought an action, and filed his original againſt the executor; the other ſimple contract creditors offered the plaintiff to divide the aſſets in proportion, but he having filed his original inſiſted on his whole debt in preference to the others. Upon this the executor gave judgment in ſeveral quantum meruits brought by the other ſimple contract creditors, of the ſeveral ſums which were laid as damages in the declaration, without aſcertaining the damages by writ of inquiry, but they were ſo laid as not to exceed the real debt. Upon which the plaintiff at law brought his bill in equity, but decreed that executor might prefer any creditor, and the Maſter of the Rolls diſmiſſed the plaintiff's bill with coſts, and affirmed on appeal by Ld. Chancellor. Wms's Rep. 295. Mich. 1715. Waring v. Danvers.

19. A *decree niſi, &c.* againſt an executor ſhall be preferred to a *judgment on a bond* obtained on an action brought after ſuch decree, and the judgment had before the decree was made abſolute. Decreed by the Maſter of the Rolls, and affirmed per Ld. Somers on a re-hearing. Chan. Prec. 79. pl. 69. Mich. 1697. Joſeph v. Mott.

Ibid. 189. is a nota, that appeal was brought in the Houſe of Lords, and on 21 November 1702, the decree was reverſed, and the payment allowed. —— S. C. cited 3 Wms.'s Rep. 401, 402. in a note there, and that the decree was reverſed in the Houſe of Lords.

20. *After a bill and anſwer put in, the executor voluntarily paid a bond debt*, and was diſallowed on the account, becauſe he might, by confeſſing judgment, have preferred him, and no difference in reaſon, where paid without ſuch confeſſing. Chan. Prec. 188. pl. 154. Hill. 1701. Darſton v. Earl of Orford.

21. If executor voluntarily pays a *ſtatute before a judgment* had againſt his teſtator, it is a devaſtavit; but if after teſtator's death execution be taken and executed, he may plead it to a *ſci. fa. upon the judgment*, becauſe he could not hinder execution. 6 Mod. 144. Paſch. 3 Ann. B. R. Per Holt Ch. J. cites And. 208, 209.

22. Executor may pay debts of a higher nature, or as high a nature, *pending a bill in equity againſt him, or after a decree quod computet*, but this muſt be intended where he has legal aſſets; for if he has only *equitable aſſets*, the Court will not indemnify him and ſuffer him to diſappoint and prejudice the firſt ſuitor, and where there is a *final decree* againſt an executor, and he pays a [ 299 ] bond, it is a miſpayment, for a decree is in the nature of a judgment; per Cowper C. 2 Salk. 507. pl. 1. in Canc. Maſon v. Williams.

23. *Executors having paid off debts by ſpecialty, and retained their own debts on ſimple contract, agree with the principal creditors on ſimple contract to pay them equally. One brings an action on a ſpecial original to get preference* to himſelf, and thereupon the *executors confeſs judgments*

*ments to the reſt*, but he brings his *bill to ſet aſide the judgments*. N. B. There was an *agreement between the executors and the other creditors* to whom the judgments were ſo given, *that what ſhould be recovered by them ſhould be equally divided among them excluſive of the plaintiff*, which the plaintiff ſuggeſted to be a fraud. But bill diſmiſſed with coſts by the Maſter of the Rolls, and the decree affirmed on appeal by the Ld. Chancellor. Wms.'s Rep. 295. pl. 73. Mich. 1715. Waring v. Danvers.

## (R. a) [What Debts ought to be firſt ſatisfied.]

### Judgments in Life of Teſtator.

[1. IF a man acknowledge a *ſtatute* to another, and *afterwards another recovers in debt againſt him*, and after he dies, the executor ought to ſatisfy this judgment before the ſtatute, becauſe it is more worthy, for in a *ſci. fa.* againſt him upon the judgment, it is no plea for the executor to plead the ſtatute acknowledged by the teſtator before the judgment. Mich. 32, 33 Eliz. B. R. adjudged, * BOND AGAINST BAYLIE. And there it is ſaid, that Paſch. 32 Eliz. B. it was adjudged between † CONNY AND BARHAM.]

* Le. 328. pl. 464. S. C. adjudged accordingly. —3 Le. 270. pl. 364. S. C. in totidem verbis.

† Le. 329. in pl. 328. cites S. C.

——3 Le. 271. in pl. 364. S. C. cited.

[2. If a man *recovers a debt againſt B. and after B. acknowledges a ſtatute to C.* and after makes his executor and dies, the executor ought firſt to ſatisfy the judgment, *and not the ſtatute which became due after the death of teſtator*, for the judgment is more high. Dubitatur. Hill. 42 Eliz. B. R. between BEARBROOK AND READ.]

Cro. E. 734. pl. 2. S. C. adjornatur. —Ibid. 822. pl. 20. S. C. Paſch. 43 Eliz. adjudged. —4 Rep. 59. b. 60. a. S. C. cited by the reporter as reſolved. ——— S. C. cited accordingly 5 Rep. 28. b. But a writ of error having been brought of the judgment, and the record removed, pending which the executor paid the ſtatute, it was held by the greater part of the juſtices at Serjeant's Inn on a reference, that the ſatisfying the debt on the ſtatute firſt was no devaſtavit, becauſe he could not withſtand it, and he ſhall not be put to his audita querela; and therefore adjudged for the defendant. ——— Yelv. 29. Rede v. Bereblock, S. C. held by the major part of the juſtices accordingly; for it was doubtful whether the judgment would be affirmed or not. ——— See 4 Mod. 248. where it is ſaid per Cur. that by the writ of error the execution of the judgment was ſuſpended.

[3. If *A. recovers againſt B. and after C. recovers* againſt him, and after B. dies, his executor may ſatisfy *which of the judgments he pleaſe*, ſcilicet, the latter judgment if he will, for they are one as to him. Trin. 12 Ja. B. R. per Nichols.]

4. One *owed money on a bond, and alſo upon a recognizance*, and the *bond creditor got judgment, but before execution the defendant died, having goods to the value of the debt recovered, and made his wife executrix, to whoſe hands the goods came*; afterwards *the goods were taken in execution upon the recognizance*, and thereupon *the bond creditor brought a ſcire facias* againſt the executrix, to which ſhe pleaded [300] the

the execution on the recognizance, and adjudged a good plea, because she being chargeable with the just debts of her husband, and execution being taken out upon the recognizance, she could not prevent its being executed, especially since she had no notice of the judgment on the bond, and she shall not be charged with the judgment without other matter. 2 And. 157. pl. 87. Mich. 44 & 45 Eliz. Anon.

5. Plaintiff brings *debt against administratrix upon two former judgments against* the intestate, and shews the recoveries. Defendant *pleads the intestate entered into a recognizance to Sir H. B. and that after the judgments obtained by the plaintiff, Sir H. B. had judgment against the intestate upon the recognizance*, and she had not assets beyond the goods liable to the judgment on the recognizance. Plaintiff demurs, and two of the justices held the plea good, as if it had been demanded upon the two first obligations; but the two other justices were of a contrary opinion, for the plea had not been good against the intestate himself, and that the action brought by the plaintiff was in nature of a scire facias, for he demanded the debt in another course than it was at first, for the debt is now become a judgment on record; but the plaintiff dying, the Court did not resolve. Yelv. 133. Trin. 6 Jac. B. R. Gomersal v. Aske.

6. To a scire facias on an interlocutory judgment against an executor the defendant cannot plead a judgment in bar; for the statute never intended that the executor should stand in any other circumstances to make another defence than the party to the contract himself might have made against the inquiry, and he could have pleaded nothing but a release or other matter in bar arising puis darrein continuance. He is, by the words of the statute, to shew cause why damages in such case shall not be assessed and recovered, and if he shall appear at the return, and not shew any matter sufficient to arrest the final judgment, then a writ of inquiry shall be awarded, &c. and arresting judgment is by matter apparent in the record, and not extrinsic. 1 Salk. 315. pl. 23. Pasch. 3 Ann. B. R. Smith v. Harman.

## (S. a) What Debts ought to be first satisfied by them, and what not, without a Devastavit.

### Judgment in Life of Testator.

The order which an executor is bound to observe, is

[1. SO much of the *goods* of testator as is *sufficient for his funeral*, may be employed to such use before debts or legacies paid. 37 H. 6. 30. 28.]

first to discharge the funeral. 2dly, Debt to the king. 3dly, Rent upon leases for years. 4thly, Judgments. 5thly, Statutes and recognizances. 6thly, Obligations. 7thly, Contracts. 8thly, Legacies. And if he does not observe this rule, he exposes himself to a devastavit, which he is to answer pro tanto out of his own goods. Jenk. 274. pl. 94.

[2. If

[2. It ſeems *that rent reſerved* on a leaſe which comes to executor, if the rent become *due in time of the executors*, it ought * not to be ſatisfied before judgments or other debts of the teſtator, for *this is the proper debt of the executors; for the action ſhall be brought againſt them in the debet and detinet*, as in 5 Rep. HARGRAVE'S CASE.] Fol. 927. This caſe reported 5 Rep. 31. is not law, and Jones J. ſaid, he knew it to be reverſed in point of judgment for this. Cro. C. 225. in caſe of Smith v. Norfolk.

[3. But it ſeems *otherwiſe it is of arrearages incurred in life of teſtator*; but quære this, for Maſter Olde ſaid to me that it has been reſolved contra becauſe it is real, for 11 H. 4. 79. b. acceptance of a bond, for it does not extinguiſh it, therefore higher.] Br. Dette, pl. 64. cites S. C. but S. P. does not appear. ——Fitzh. Barre, pl. 185. cites S. C. & S. P. ——Arrears of rent due on a leaſe parol determined is payable by executors before bonds. 3 Lev. 267. Newport v. Godfrey. ——But per Cur, debts on bonds and rents due are of equal nature. 1 Salk. 326. Gage, alias Gray v. Acton.

[4. A *judgment in life of teſtator* ought to be ſatisfied before any debt, for if the *executor ſuffers a judgment* againſt him *at the ſuit of another and execution*, it is a devaſtavit if he has not ſufficient. 21 E. 4. 21. b.]

[5. The ſame law is if teſtator be *indebted of record to the king*, this is in nature of a judgment, and therefore ought to be firſt ſatisfied. 21 E. 4. 21. b.] Br. Prerogative, pl. 71. cites S. C. —— The king has no prerogative in his debts, unleſs his debt be of record, but if the executor of his debtor pays other debts before the debt of the king it is good adminiſtration, unleſs the debt be of record, and the executor is excuſed againſt the king, per Brown and Choke Juſtices, contra Littleton. But ſee at this day a great *ſtatute* 33 *H.* 8. *cap.* . *where the king has now prerogative in his debts*. Br. Prerogative, pl. 71. cites 21 E. 4. 21. ——If a man had judgment againſt A. on an obligation, who dieth, and another obligee of the ſaid A. aſſigns his obligation to the king, and the executors of A. ſatisfy the ſaid judgment, it is good againſt the king in reſpect the debt due to the king was not upon record before the death of the teſtator. Per Tanfield Ch. B. which was granted by the Court. Lane, 65. Trin. 7 Jac. in Dimmock'e caſe.

6. Where there are *ſeveral judgments againſt teſtator* it is not material which of them was precedent or prior in time; but he which *firſt ſues execution* muſt be preferred. And *before execution ſued* by either, it is at the executor's *election* to pay which he will firſt. And if *each brings a ſcire facias*, yet the executor may confeſs the action of which he will firſt, notwithſtanding the ſcire facias was brought by one before the other. Went. Off. Ex. 136, 137.

7. *Scire facias againſt executor of J. S. upon a decree in the Exchequer againſt J. S. for money*; the defendant *pleaded, that the teſtator was indebted to him by bond, and that he had paid himſelf before the ſcire facias brought, or notice of the decree*; it was ruled by three barons againſt baron Powell that this was no bar; and that a decree in equity obliges an executor in equal degree at leaſt with a judgment at common law. 3 Lev. 355. Paſch. 5 W. & M. in Scacc. Shaftoe v. Powell.

## (T. a) [What Debt ought to be first satisfied.]

### Judgment in their own Time.

[1. ] IF a man brings *debt against* executor, and *pending this another brings debt and first recovers*, he shall be first satisfied. 9 H. 6. 58.]

### Where Action is brought.

[2. If an action be brought against executor *in another county* than where the executor *lives*, he may, *before notice of the action brought*, pay other debts, because it is in another county. 2 H. 4. 21. b. Curia. Pl. C. 279.]

[3. If action of debt brought against an executor *be abated*, in *new actions by Journey's account* he ought to plead fully administered the day of the first writ purchased (therefore he cannot pay any *debts mesne, between the abatement and the new writ*). * 48 E. 3. 21. † 2 H. 4. 21.]

* Br. Administrator, pl. 14. cites S.C. & S.P. —— Fitzh. Administrators, pl. 18. S. C. —— See (Q. a) pl. 7. S. C. Journey's Accounts, pl. 4.

† Br. Journey's Accounts, pl. 8. S. C. —— Fitzh.

2 Roll. Rep. 186. 204. 209. S. C. but I do not observe exactly the S, P.

4. Debt; the defendant *pleaded fully administered*; the plaintiff *replied, that at another time he brought an action* of debt against the now defendant, *whereupon she was outlawed upon mean process, and she brought error and reversed the outlawry, whereupon he freshly brought this action, and that at the time of the first action brought she had assets* & hoc petit quod inquiratur per patriam, et defendens similiter; and thereupon a *verdict found for the plaintiff*, and judgment; error was brought, and insisted upon that here is not any plea; for though she had assets at the time of the first action brought, yet she afterwards might have well administered it by reason of a lawful recovery, or lawful payment after; sed non allocatur; for it shall not be intended without special matter shewn; and it *suffices if there was enough at the time of the first action brought, unless she shews sufficient cause of discharge after that time.* Cro. J. 579. pl. 9. Trin. 18 Jac. B. R. Aldrich v. Walthal.

5. *Executor confesses judgments* in debt upon simple contract, and pleads them in bar of assumpsits; judgment for defendant. 1 Lev. 200. Hill. 18 & 19 Car. 2. B. R. Palmer v. Lawson.

Mod. 6. pl. 19. S.C. adjornatur. —— Raym. 210. S. C. adjudged for the plaintiff. —— S. C. cited by Holt Ch. J. 6 Mod. 144.

6. In assumpsit *after verdict* for plaintiff, and before day in Bank defendant dies. Plaintiff brings scire facias upon a judgment entered next term upon the Oxford act; the executor defendant pleads obligation to himself for 100 l. and a judgment to A. but no scire facias upon it, and that he has no assets beyond 40 l. (he is executor). This judgment shall so relate that it shall be as a judgment in life of testator by the new statute and be first paid 1 Lev. 277. Mich. 21 Car. 2. C. B. Burnet v. Holden.

7. To

7. *To debt upon a ſpecialty* againſt an executor *it is a good bar that judgment has been had* againſt him *on a ſimple contract ultra*, &c. Gibb. 76. Trin. 2 & 3 Geo. 2. C. B. Davies v. Monkhouſe.

## Executors. Adminiſtrators. [303]

## (U. a) [What Debts, &c. ſhall be firſt paid.]

[1. DEBTS for *ſervant's wages within the ſtatute* of labourers ſhall be paid before *ſimple contracts*, as to me it ſeems.]

### Contracts.

[2. Debts upon *ſimple contract* are to be paid before *legacies*. 9 Rep. 90. b. PINCHON'S CASE.]

[3. Dr. and Student, 78. They are to be paid before *legacies* in conſcience, but the Dr. ſeems, and it is not denied by the Student, that if he pay the legacies firſt, the debtee has no *remedy*.]

[4. Quære, whether a debt upon *ſimple contract* be to be paid after a debt for *ſervant's wages* who is *not within the ſtatute* of labourers?]

[5. 37 H. 6. 30. By Priſot *debts* are to be paid before *legacies*. 21 E. 4. 23. b. * 2 H. 6. 16.] If executor pays legacies firſt, ſo that the reſidue is not ſufficient to pay the debts, he ſhall be charged of his own proper goods; for this is not ſufficient adminiſtration, and the iſſue was fully adminiſtered, and this matter was given in evidence. Br. Adminiſtrator, pl. 37. cites 21 E. 4. 21. [And ſo it ſhould be in Roll (21. b), the (23) being miſprinted.] * S. P. Br. Deviſe, pl. 3. cites S. C.

[6. *Debts to the king by matter en fact* are all one with *debt of a common perſon*, and of them the executor has election to pay which he will firſt. 21 E. 4. 21.] See (S. a) pl. 5. S. C. and the notes there.

## (X. a) What Debts ought to be firſt ſatisfied before Legacies. Fol. 928.

[1. IF a man binds himſelf in an *obligation to perform a certain thing*, and deviſes divers *legacies* and dies, leaving but ſufficient to ſatisfy the bond, if it ſhall become forfeited, yet this obligation ſhall not be any bar of the legacies, becauſe it is *uncertain if the obligation ſhall ever become forfeited*, but the *executor ſhall make a conditional deliverance of the legacy*, ſcilicet, if the obligation be recovered againſt him, the legatee ſhall re-deliver the legacy. Hill. 13 Eliz. B. R. in caſe of NECTON AND SHARP'S CASE.] Mo. 413. pl. 568. S. C. but S. P. does not appear. —— Goldſb. 141. pl. 54. S. C. but S. P. does not clearly appear. —— Ow. 72. Norton and Sharp v. Gennet, S. C. —— Cro. E. 466. pl. 17. S. C. held accordingly; but the legatory by the civil law ſhould enter into a bond to make reſtitution if the obligation ſhould afterwards be recovered, and ſo there is no inconvenience to any; and to that the counſel of the other ſide, and the whole Court, beſides Fenner, agreed; and a conſultation was granted. —— S. C. cited by Roll Ch. J. Sty. 56. Mich. 25 Car.

[2. So

[2. So if a man binds himſelf in an *obligation*, being under-keeper of Ludgate, *to the ſheriffs to keep all priſoners ſafely, and alſo to ſave them harmleſs* from all eſcapes of priſoners to be * committed to him during their ſhevralty, and after he ſuffers a priſoner to eſcape, by which *the debt is recovered againſt the ſheriffs* in a writ of eſcape, and ſo the *obligation is forfeited*, yet if he gives divers *legacies* and dies, not leaving ſufficient aſſets, but to ſatisfy the bond the executors ſhall not bar the legatees by this obligation forfeited, becauſe it may be that the ſheriffs will never ſue them upon the obligation, but *he ſhall deliver the legacies conditionally*, ſcilicet, if the ſheriffs recover againſt them, they ſhall re-deliver the legacies. Hill. 38 Eliz. B. R. between NECTON AND SHARP.]

3. Deviſe of lands to his executors *towards payment of debts and legacies*. Decreed that the debts be fully paid before the legacies, and difference taken between ſuch appointment made by *will* or by deed. 1 Chan. Caſes, 275. Paſch. 28 Car. 2. Whitton v. Lloyd.

## (X. a. 2) What Debt ought to be firſt paid.

### Debts by Specialty.

1. DEBT upon *bond*, though the *day of payment is not yet come*, ſhall be paid before a debt on *contract*. Cro. E. 315. pl. 9. Hill. 36 Eliz. B. R. Buckland v. Brook.

The obligation is a duty preſently, and the condition is but a defeaſance of it. Per Gawdy J. Le. 187. in caſe of Woodſhaw v. Fulmerſton.

2. A *ſtatute* is a preſent duty, and therefore ought to be paid before a *bond*. Sty. 55. Arg. 14 & 15 Jac. cites Robinſon's caſe.

2 And. 158. Arg. cites Thruſton v. Verney, Hill. 20 Eliz.

3. It is a devaſtavit in executor to pay *voluntarily* a debt by ſimple contract before a debt by *bond*, *whereof he had notice* (and not otherwiſe) in that caſe; per Vaughan Ch. J. Vaugh. 94. Trin. 22 Car. 2. C. B. Edgcomb v. Dee.

Mod. 175. in caſe of Brooking v. Jennings, per Vaughan, that debts on ſimple contracts may be paid before bonds, unleſs timely notice be given to the executor, and ſuch notice muſt be by action. Two other juſtices agreed, but one doubted. —— Comb. 35. S. C. ſays that it was afterwards adjudged for the plaintiff Mich. 3 Jac. 2. ——3 Mod. 115. S. C. & S. P. agreed by the Court, but gave no judgment.

4. Huſband before marriage gives a *bond to leave his wife worth* 1500 *l.* if ſhe ſurvived. He died in debt to others, and no proviſion made for the wife. This bond decreed to be ſatisfied firſt. Fin. Rep. 232. Trin. 27 Car. 2. Hodgkin v. Blackman & al'.

S. C. cited Cro. C. 363. in caſe of Goldſmith v. Sydnor. ——Cro. J. 8. Phillips v. Echard, in caſe of a ſtatute for performance of covenants.

5. A. is indebted to B. by *mortgage*, and gave bond *to perform covenants*, and is indebted to C. by *bond*. The perſonal aſſets ſhall be applied to pay off the bond-debt, and no allowance to be thereout made in reſpect of the bond for performanee of covenants in the mortgage-deed. 2 Vern. 273. Trin. 1692. Fletcher v. Stone.

6. If an indebitatus be brought againſt an executor, and he pleads that his teſtator did covenant ſeveral things, and that the * *covenant was broke*, and that the damage thereof amounted to ſo much, and ſhews that he has no more aſſets, it will be a good plea though the damages are not certain; per Holt Ch. J. 6 Mod. 144. Paſch. 3 Ann. B. R. in caſe of Smith v. Harman.

7. Decreed at the Rolls that *mortgages* were to be paid firſt, then judgments, and then *recognizances*, &c. But on appeal to the Lords it was adjudged, that mortgages were not to be preferred to other real incumbrances, but mortgages, judgments, ſtatutes, and recognizances, ſhould take place according to priority, and *as they ſtand in order of time*. 2 Vern. 525. pl. 474. Mich. 1705. Earl of Briſtol & al' Creditors of Baſſet v. Hungerford.

8. A. *mortgaged land to J. S.* and gave a bond to perform covenants, and about ſix years after died *inteſtate*. *M. poſſeſſed herſelf of the goods without taking letters of adminiſtration*, and pays away all the aſſets in diſcharging debts on *ſimple contract*. About ſeven years after A.'s death an old dormant entail was diſcovered, and the heir in tail brought ejectment and recovered poſſeſſion, whereupon the executor of J. S. ſued M. on the bond. M. prays an injunction, ſhe having paid all away, and never having any notice given her of the bond. Defendant demurred and was allowed, the bill being an attempt to alter the courſe of law; but *if any fraud* had been charged on defendant, by which ſhe was deceived, or *inducing her to pay away the aſſets*, it might have varied the caſe. Chan. Prec. 524. pl. 329. Trin. 1720. Greenwood v. Brudniſh.

9. A *voluntary bond* ſhall be diſcharged before legacies, but not before debts due by ſimple contract, which are bona fide due. Decreed per Harcourt C. Abr. Equ. Caſes, 84. pl. 2. Jones v. Powell.

S. C. cited and decreed accordingly by Ld. C. Talbot. Caſes in Equ. in Ld. Talbot's Time, 156. Mich. 1735. in caſe of Cray v. Rooke.

## (X. a. 3) What Debts ought to be firſt paid.

### Debts without Specialty.

1. WHether a *fine upon admittance* may be paid before a bond and not be devaſtavit; three juſtices thought it would, but the Ch. J. e contra. 3 Mod. 240. Mich. 4 Jac. 2. B. R.

2. Executor cannot pay ſo much *as funerals* before he pay a *judgment* had againſt teſtator. Brownl. 76. Hill. 11 Jac. Hancock v. Wrenham.

3. A *contingent ſecurity* ſhall not ſtand in the way of a debt by *ſimple contract* as to the adminiſtration of aſſets by the executor. 2 Vern. 101. Paſch. 1689. ſays it was ſo reſolved in the caſe of Eeles v. Lambert.

Otherwiſe creditors might be exceedingly defrauded by recognizances for the peace, and of good behaviour, &c. and ſo by ſtatutes for performance of covenants for enjoyment of land, if theſe ſhould keep off the payment of debts, and yet themſelves perhaps never be forfeited, nor the ſums never become payable. Went. Off. Ex. 141.

4. Articles of *agreement on marriage to ſettle* 1500*l. per ann. on iſſue.* A ſettlement is made, but deficient. The huſband deviſed all his unſettled lands for payment of debts. Per Cur. if the ſettlement is deficient, yet, in regard there is no covenant in the articles, nor mention of any *particular lands*, the widow and infant [306] muſt come in for ſatisfaction after *bond-creditors*, whoſe debts are aſcertained and fixed, whereas the demands on the articles only ſound in damages. 2 Vern. 272. pl. 257. Trin. 1692. Whitchurch v. Lady Anne Bainton.

## (X. a. 4) What Debts ſhall be paid firſt.

### By ſpecial Direction of Chancery.

1. BOND to ſecure 400l. borrowed was made *in quadraginta libris*, where the ſum borrowed amounted to *quadringent'*, 120l. of the 400l. was paid. Decreed the bond to ſtand as a good bond of the penalty of the 400l. for the ſecuring the 280l. due, and that this bond takes place of any other bond on which judgment has not been obtained. Fin. Rep. 413. Hill. 31 Car. 2. Simms v. Barry.

Chan. Prec. 17. ſays the bond was conditioned for payment of the 500 l. to be equally divided between the three children, and that the bond was

2. A freeman of London, having three baſtards by B. confeſſes *a judgment to B.* of 1000l. defeaſanced for payment of 500l. *in three months after his death.* Decreed that this, being a voluntary judgment, ſhall not prevail againſt debts by ſimple contract, nor againſt the widow of the freeman, but that ſhe muſt have her ſhare according to the cuſtom of the city, without any regard had to this judgment; but his debts being paid, the judgment would bind the legacy-part. 2 Vern. 202. pl. 186. Hill. 1690. Fairbeard v. Bowers.

without conſideration, and being to be paid after A.'s death, it was looked upon as a legacy.

Chan. Prec. 190. pl. 155. S. C. See tit. Payments (P), pl. 5. and the notes there.

3. *Where there are legal and equitable aſſets*, ſuch creditors as will take their ſatisfaction out of the legal aſſets ſhall have no benefit of the equitable aſſets until the other *creditors, who have only a remedy out of the equitable aſſets*, have received thereout an equal proportion of their reſpective demands; per Wright K. 2 Vern. 435. pl. 399. Paſch. 1702. Sheppard v. Kent.

## (X. a. 5) Devaſtavit. What is a Devaſtavit.

If executor ſells goods worth 10 l. for a penny, all the ſur-

1. IF an executor *ſells at a great under-value* the goods of the teſtator, it is no devaſtavit; per Frowike Ch. J. Kelw. 51. a. pl. 5. Trin. 18 H. 7. Anon.

pluſage ſhall be adjudged a devaſtavit. Per Frowike Ch. J. Kelw. 59.—The plaintiff may aver the under-value, and it ſhall be tried by jury. Per Frowike Ch. J. Kelw. 63. 6.——But it is better to ſell under the value than to loſe the whole by a total forfeiture, as in caſe of a leaſe for years which comes to the

the executor ſubject to a condition for payment of rent, or of a ſum in groſs, and no profits accrue to him to enable him to pay it. Went. Off. Ex. 114, 115.

2. *Adminiſtration durante minore ætate* of two infants executors was granted to another, who *poſſeſſed himſelf of the goods* of the teſtator to the value of 400l. and *when the infants executors came of age, they releaſed to the adminiſtrator all demands.* Adjudged, this was a devaſtavit, though the goods never were in their poſſeſſion, and the releaſe of the infants executors was aſſets. Godb. 29. [307] pl. 39. 27 Eliz. C. B. Kitley's caſe.

3. *Surrender of a term* by executor which was *deviſed by A.* adjudged a devaſtavit, yet it ſeems A. may have this as legacy notwithſtanding this ſurrender. Mo. 358. pl. 487. Trin. 36 Eliz. Carter v. Love.

4. If one ſues the adminiſtrator and gives notice, yet he may *confeſs the action of another* that commences his ſuit after if there is *no fraud;* but if adminiſtrator is *ſued on a bond, and pays another debt on bond without ſuit*, there if he had *notice* of the ſuit it is a devaſtavit. The notice is material. Mo. 678. pl. 926. Trin. 44 Eliz. C. B. Scarles's caſe.

5. If an executor *pays a bond made on an uſurious contract*, it is a devaſtavit; per Hobart. Brownl. 33. Anon.

6. If executor pays a *bond made on an uſurious contract* it is a devaſtavit in the executor, and if he be bound to preſent one to a church, and he *preſents one on a ſimoniacal contract*, the bond is broken; per Hobert Ch. J. Brownl. 33. Anon.

Other creditors may ſue and make a devaſtavit of it. Hob. 167.

7. If *defendant confeſſes* that he had more in his hands at the time of adminiſtration repealed than was ſufficient to pay the plaintiff's debt, if after judgment againſt defendant the *ſheriff* cannot levy the debt in defendant's hands, he may on the defendant's own ſhewing without any damage *return a devaſtavit.* Brownl. 116. Paſch. 10 Jac. Morgan v. Sorck.

8. Executor *for a time* waſting the goods, how the creditors ſhall be relieved after his time expired. See Hob. 266. pl. 349. Chandler v. Thompſon.

9. *Submiſſion to arbitrement being their voluntary act*, although the arbitrators by their judgment do diſcharge the debt or damage in part, or in whole, yet ſhall the creditors have like remedy thereupon againſt the executors as if they had releaſed, or, which is more, received the ſame. Wentw. Off. Ex. 71.

10. If an *executor of full age, upon receipt of all principal and intereſt due, releaſes a bond*, it is no devaſtavit, and is aſſets only for the money received; for nothing is done but what in good conſcience ought to be done; per Brampſton Ch. J. and Damport Ch. B. Cro. C. 491. Mich. 13 Car. in caſe of Kniveton v. Latham.

11. Executor is ſued. Though he may *abate* the action, but does not, but ſuffers judgment againſt him, yet it is no devaſtavit. Sid. 404. Per Twiſden J. Hill. 20 & 21 Car. 2. in caſe of Parker v. Maſters.

Sty. 54, &c. S. C. a bond to ſave harmleſs ſhall not ſtand in the way of legacies, but the legatee by the civil law ſhall enter into a bond to make reſtitution if the bond ſhould be recovered afterwards. Agreed per counſel and Court, except Fenner J. Cro. E. 467. pl. 17. Hill. 38 Eliz. B. R. Nector and Sharp v. Gennet. ——— S. C. cited 2 Vern. 101. ——— S. P. Cro. J. 102. in caſe of Milles v. Sheffield. ——— Per Gawdy J. accordingly in caſe of a ſtatute to perform covenants, which if not broken ſhall not prevent the payment of debts for the inconvenience, that though the ſtatute may never be broken, yet the debts ſhall never be paid, and yet he owned he thought the miſchief would be greater on the other part; for if the executors do pay this debt, and the ſtatute is broken, he ſhall be chargeable afterwards by a devaſtavit of his own proper goods. Goldib. 142. pl. 57. Hill. 43 Eliz. Woodcock v. Hern.

12. Payment of debts upon *ſimple contract* is a good adminiſtration againſt *judgments defeaſible upon performances of covenants*; Arg. ſaid it had been ſo agreed. Allen, 40. Hill. 23 Car. B. R. in caſe of Eales v. Lambert.

Perhaps the defendants in a like caſe have not actually waſted the goods of teſtator, but have them in their hands in ſpecie, but keep them ſo ſecretly that the ſheriff cannot find them to levy the plaintiff's debt upon them, then it is reaſon that the defendants be charged de bonis propriis though there is no devaſtavit in the caſe. 2 Saund. 402. pl. 67. Paſch. 24 Car. 2. Blackmore v. Mercer.

13. In a *ſci. fa.* on a judgment, it is ſuggeſted that defendant bona, &c. ad valentiam, &c. elongavit vendidit, & in uſum ſuum proprium convertit, & *diſpoſuit ea intentione quod dicta executio non fieret*. * The ſheriff found that diſpoſuit in *uſum proprium*, and defendant appeared and traverſed, and it is found by verdict againſt him, the Court will not doubt the ea intentione, and ſo he has done a tortious act in contriving and endeavouring to defraud the plaintiff of his debt, which amounts to a devaſtavit. Saund. 307. Mich. 21 Car. 2. Merchant v. Driver.

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15. An executor in caſe of a devaſtavit is in nature of a *truſtee* of an eſtate. Chanc. Caſes, 304. Mich. 29 Car. 2. in Vanacre's caſe.

16. The *penalty of a bond* is but 40*l.* but the *condition is for* 200*l.* The executor cannot pay it without a decree, without a devaſtavit to other creditors; but the payment was decreed. 2 Chan. Caſes, 225. Hill. 28 & 29 Car. 2. Sims v. Urry.

17. *Execution againſt the goods of the executor for a debt in jure proprio* is a devaſtavit nolens volens. 3 Keb. 839. in pl. 1. Hill. 29 & 30 Car. 2. cites it as held by Rainsford Ch. J. in the laſt term in Norden's caſe.

Executor ſuffers judgment for principal and intereſt incurred in his own time. This is not pleadable without ſhewing ſpecially defect of aſſets to pay this before the incurring it by the executor. 2 Lev. 40. Seaman v. Dee. ——— The intereſt incurred after the teſtator's death is the executor's proper debt. Vent. 199. S. C.

18. It is a devaſtavit to *permit intereſt to run in arrear, and then ſuffer judgment for it*, and want of aſſets to pay it before the incuring of it by the adminiſtrator ſhall not be intended unleſs it be expreſsly pleaded. 2 Lev. 40. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

19. Executor *confeſſes judgment in aſſumpſit when there is another debt upon bond*, he muſt pay both, for he might have pleaded the bond in bar of the contract debt, which not having done, his not having aſſets to pay both is no excuſe. 3 Lev. 114. Paſch. 35 Car. 2. C. B. Britton and Bathurſt.

20. *Place*

20. *Place waſted recovered* againſt an executor de ſon tort is a devaſtavit, and if there happen to be a rightful executor or adminiſtrator, he ſhall recover againſt the executor de ſon tort, but he cannot get the land from the reverſioner again. 2 Show. 457. Hill. 1 & 2 Jac. 2. B. R. City of Norwich v. Johnſon. 3 Mod. 90. S. C. and judgment in C. B. affirmed in B. R.

21. Executor of an obligee *takes a goldſmith's note*, who fails; it is a devaſtavit; cited as adjudged by Pemberton Ch. J. Vern. 474. Mich. 1687. in caſe of Barker v. Talcot and Shaw.

22. An *adminiſtrator brought trover* for goods, *and recovered, and takes part in hand, and accepts a covenant for ſatisfaction of the reſidue;* and the *debtor afterwards failed.* It was adjudged in C. B. to be a devaſtavit in the adminiſtrator, and the judgment was afterwards confirmed upon a writ of error in the Houſe of Lords. Vern. 474. Mich. 1687. cites the caſe of Norden v. Levett. Freem. Rep. 442. pl. 599. S. C. The Court ſaid this was tantamount to a ſale of goods, in which caſe the adminiſtrator ſhall be charged though he never receive the money Adjornatur. —— 2 Lev. 189. S. C. held at firſt to be no devaſtavit, but Sir Tho. Jones contra & adjornatur; but after in the next term all the juſtices agreed that it was a diſpoſal by him, and adjudged for the plaintiff. —— 2 Jo. 88. S. C. adjudged a devaſtavit. —— S. C. cited by Holt Ch. J. 6 Mod. 94. in caſe of Jenkins v. Plume.

23. *Submiſſion to an award* by an executor is a devaſtavit. 12 Mod. 11. Per Cur. Mich. 3 W. & M. For if by the award the debtors or wrong-doers be diſcharged without making full recompence, he muſt anſwer the reſt of the value to the other creditors, becauſe his ſubmiſſion was his voluntary act. Went. Off. Ex. 159.

24. Executor *loſes a bond due to teſtator.* The Court inclined to charge defendant with the debt, but for the preſent directed only that defendant proſecute with effect a ſuit brought by him againſt the obligor, in order to recover the money on the loſt bond, and reſpited judgment in the mean time. 2 Vern. 299. Trin. 1693. Goodfellow v. Burchet. [ 309 ]

25. A *recovery by baron of a feme executrix* amounts to a devaſtavit at law pro tanto, ſo as to charge both huſband and wife in their own right. Per Holt Ch. J. But per Rookby J. it is direct aſſets at law. Carth. 463. Mich. 10 W. 3. B. R. Yard v. Ellard.

26. If inteſtate *after* the *action brought* had *died within the ſix years*, ſo as the adminiſtrator had convenient time to bring the action within the ſix years, and that he does not do, but brings the action after the ſix years, that will not help him; ſo *not bringing the action within the ſix years would be a devaſtavit.* Per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in caſe of Hayward v. Kinſey.

27. *Executor appoints another to receive a debt of teſtator's, who will not repay;* it is a devaſtavit. 6 Mod. 93. Hill. 2 Ann. B. R. in caſe of Jenkins v. Plume.

28. A *term aſſigned by an executor in truſt to attend the inheritance,* ſhall in equity follow all the eſtates created out of it, and all incumbrances ſubſiſting upon it; but the term being by this means become not aſſets at law, the executor who aſſigned the ſame is liable to the creditors as for a devaſtavit. Per Ld. Chancellor. 3 Wms.'s Rep. 330. Mich. 1734. in caſe of Charlton v. Low.

## Devaſtavit.

### (X. a. 6) Who ſhall have the Action.

1. A. *Is creditor by ſtatute* 100*l.* and *B., C., and D., by bond* 100*l.* and the aſſets in the executor's hands are only 100l. *Executor pays the* 100*l. to D.* this is a devaſtavit only as to A. and he is not liable to B. or C. Went. Off. Ex. 163.

2. *But* if he had only *paid a legacy or debt by contract*, leaving nothing to ſatisfy the debts by ſpecialty, then he had been equally liable to each of the other creditors, viz. to him who could firſt recover, or by the voluntary act of the executor could obtain payment, who muſt be preferred if the ſum would reach no farther, and there being no creditor by record. Went. Off. Ex. 163.

### (X. a. 7) Liable. Who.

1. IN this caſe it was holden by all the barons clearly, that the executor of an executor ſhould not be charged *with a devaſtavit* made *by the executor of the firſt teſtator*, no not in the caſe of the king, becauſe it is a perſonal wrong only. 3 Le. 241. pl. 334. Mich. 32 Eliz. in the Exchequer. Sir Brian Tucke's caſe.

2. If D. were indebted to A. 100l and A. his executor *took a new bond of him, or another* for it, *giving up the old bond*, now it is become his own debt, and ſo ſhall ſtand in his executor. Went. Off. Ex. 72.

[310] 3. *Executor of an executor* is liable to make good the quantum of the devaſtavit to the creditors if he has aſſets from the firſt executor. Chan. Caſes, 257. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

4. *Feme covert* cannot waſte during coverture, though the *devaſtavit of the baron ſhall charge her if ſhe ſurvives.* 2 Lev. 145. Trin. 27 Car. 2. B. R. adjudged in caſe of Horſey v. Daniel.

5. Twiſden put this caſe. A. has ſeveral debts owing by bond and dies, and makes B. his *executor*, who *delivers up theſe bonds, and takes bond in his own name and dies inteſtate.* The queſtion is, how the creditors of A. ſhall recover theſe debts, there being no other aſſets of the adminiſtrator de bonis non of A. or the executor of B. ? It ſeems there is no way but by a ſpecial action of the caſe againſt the executor of B. for the altering of the bonds is no devaſtavit. Freem. Rep. 284. Trin. 1674. in Miller's caſe.

6. So far as the perſonal eſtate of the firſt teſtator, which is come to the hands of the ſecond executor, will go, the *ſecond executor* ſhall anſwer. 2 Chan. Caſes, 217. Paſch. 28 Car. 2. Price v. Morgan.

7. Note

7. Note per Hale, debt doth not lie againſt the executor of an executor upon a ſurmiſe of a *devaſtavit by the firſt executor*; for, 1ſt, It is a perſonal tort, for which his executor cannot be charged. 2dly, It is ſuch an action of debt as would have admitted wager of law, and therefore lies not againſt the executor. Vent. 292. Hill. 27 & 28 Car. 2. B. R. in caſe of Brown v. Collins.

Freem. Rep. 392. pl. 506. S. C. held per Cur. that it will not lie, becauſe it was founded on a perſonal tort of the firſt executor which dies cum perſona.

8. *Debt* was brought *againſt A. executor of B. executor of C.* who pleaded that he had not of the goods of C. in his hands. To which the plaintiff replied, that *B. had waſted the goods of C. to the value of the debt demanded.* Upon which iſſue was joined and found for the plaintiff, and he had *judgment to recover de bonis B. in the hands of A.* But that judgment was *reverſed.* Vent. 292. Hill. 27 & 28 Car. 2. B. R. in caſe of Brown v. Collins.

9. It was ſaid by Finch, that though an *executor of an executor* ſhould not be charged at law for a devaſtavit by the firſt executor, yet *in equity* here he ſhould be charged. Freem. Rep. 313. pl. 386. Mich. 1675. in Canc. Anon.

10. *Executor of an executor* is liable in equity, though not at law, for a devaſtavit by the firſt executor. Chan. Caſes, 303. Mich. 29 Car. 2. Vanacre's caſe.

Altered by ſtat. 30 Car. 2. cap. 7. as to the law, which ſee infra.

11. 30 *Car.* 2. *cap.* 7. *ſ.* 2. *It is enacted, that executors or adminiſtrators of any perſon or perſons, who as executor or executors of their own wrong, or adminiſtrators, ſhall waſte or convert goods, &c. to their own uſe, ſhall be chargeable in the ſame manner as their teſtator or inteſtate would have been if living.*

12. *Executor de ſon tort* is liable. 2 Show. 457. Hill. 1 & 2 Jac. 2. B. R. Norwich City v. Johnſon.

3 Mod. 90. S. C. adjudged.—— Comb. 7. S. C. and judgment in C. B. affirmed in B. R.

13. Though an *infant at* 17 may adminiſter, yet he cannot commit a devaſtavit until 21. Vern. 328. in pl. 323. Paſch. 1685. in caſe of Whitmore v. Weld.

14. *By* 4 & 5 *W. & M. cap.* 24. *ſ.* 12. *the act of* 30 *Car.* 2. *is made perpetual, and foraſmuch as it had been a doubt, whether that act extended to executors or adminiſtrators of any executor or adminiſtrator of right, who for want of privity were not before anſwerable, nor could be ſued for debts due by the firſt teſtator or inteſtate, notwithſtanding ſuch executors or adminiſtrators had waſted the eſtate of the firſt teſtator; it is enacted, that executors or adminiſtrators of ſuch executors or adminiſtrators of right who ſhall waſte, &c. ſhall be chargeable in the ſame manner as their teſtator or inteſtate ſhould or might have been.* [311]

## {X. a. 8} Proceedings and Pleadings in Devaſtavit.

1. A Man recovered againſt executors, and fieri facias iſſued, and the ſheriff returned quod devaſtaverunt, &c. and *ſcire facias iſſued to ſay why execution ſhould not be made de bonis propriis*, and it was quod cum, &c. recuperaſſet, &c. and the *writ did not make mention if the recovery was by verdict, default, or otherwiſe, nor in what action* the judgment was, and yet the writ awarded good. Br. Scire Facias, pl. 191. cites 19 H. 6. 49.

2. R. brought debt againſt A. as executor, and upon *plene adminiſtravit*, and iſſue upon that aſſets are found, and judgment for the plaintiff, and upon a *teſtat* execution was awarded to the ſheriff in another county than where the trial was, that ſheriff may return a *nihil*, and is not eſtopped by the verdict and judgment; otherwiſe it is of the ſheriff of that county where the action was brought, for he cannot return a *nihil*, &c. but he ought to return a *devaſtavit*. Noy, 69. Robbins's caſe, cites 9 H. 6. 9.

3. If *judgment* be given againſt an executor *on demurrer*, and execution be awarded, the ſheriff cannot *return* nulla habet bona teſtatoris, but is to return a devaſtavit, as if it had been found againſt the executor by verdict; for per Cur. he has charged himſelf by his own plea. Cro. E. 102. pl. 9. Trin. 30 Eliz. B. R. Stubbs v. Rightwiſe.

The Court would not let him make ſuch general return, but enforced him upon good adviſement, either to levy the debt or return a devaſtavit. Went. Off. Ex. 167. cites Marg. D. 185. Woodward v. Chicheſter. ——— But afterwards, pag. 160. he takes this difference, that if the aſſets be found to be in the county where the trial is, the ſheriff of that county cannot return nulla bona, without adding that the executor had waſted; but if there be no verdict at all touching aſſets, the judgment being on demurrer, confeſſion, nihil dicit, &c. there he may return nulla bona teſtatoris without returning any waſting; and ſo where verdict finds aſſets generally, not finding in what place they are, or expreſsly in another county.

4. Sheriff of the county where the writ is brought ought to *return* devaſtavit, &c. and thereupon the plaintiff ſhall have *proceſs in another county*; but a further queſtion was, if a *ſci. fa.* upon *teſtatum* ſhall iſſue into another county before the ſheriff of the county where the writ was brought had returned a devaſtavit? for ſome conceived that devaſtavit where the writ was brought ought firſt to be returned, and then upon a teſtatum proceſs ſhould iſſue into any county in England. Others conceived that ſo it might, though no devaſtavit was returned on a teſtatum. 2 Le. 67. pl. 90. Trin. 31 Eliz. in the Exchequer. Noon's caſe.

5. *Sci. fa.* againſt an executor why the plaintiff ſhould not have execution *de bonis propriis* is not to be awarded on the *ſurmiſe of the party* upon a devaſtation, nor in any caſe where the judgment is de bonis teſtatoris, unleſs it be upon *return of the ſheriff* where he returns a devaſtavit. Cro. E. 530. pl. 61. Mich. 38 & 39 Eliz. C. B. Aldworth v. Peel.

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4. The defendant is not concluded by the inquiſition and *return of the ſheriff* but that he well *may traverſe it*. For otherwiſe he ſhould be without remedy. Cro. E. 860. Gibſon v. Brook.

5. In caſe of a devaſtavit *by one executor, judgment* ſhall be *general againſt all*, for the principal de bonis teſtatoris & ſi non, de bonis of him only againſt whom the devaſtavit is returned. D. 210. Marg. pl. 23. cites Mitford's caſe.

6. Where *verdict paſſes againſt the plaintiff* no devaſtavit can come in queſtion; for no judgment being for the plaintiff no writ of execution can iſſue. Went. Off. Ex. 164.

7. *And therefore* if upon the iſſue of *fully adminiſtered* it appears that there was a devaſtavit which cauſed aſſets to fail, then the *jury muſt find that defendant has aſſets and not find a devaſtavit;* for finding a waſte, viz. a ſurrender of a leaſe for years held by teſtator, it was held void and nugatory, and the Court ſaid *it muſt come in by the ſheriff's return*, viz. *upon the fieri facias;* ſo aſſets being found, judgment is given for the plaintiff to recover his debt to be levied of theſe aſſets. Went. Off. Ex. 164, 165. cites the caſe of Hankford v. Mitford.

8. In *ſcire facias againſt an executor* upon a devaſtavit returned, he *pleaded that he had no aſſets at the time of the iſſuing of the ſcire facias abſque hoc that he had waſted*, &c. And this was adjudged to be an ill traverſe; for his having waſted is but inducement; and the ſubſtance is, whether or no he had aſſets at the time of the firſt action brought. Hardr. 70. pl. 6. Trin. 1656. in Scacc. The Protector v. Holt, cites Mich. 22 Car. B. R. Ld. Roberts v. Luxton.

9. An action of *debt* lies not on a devaſtavit unleſs there be a judgment too. Cart. 2. Mich. 16 Car. 2. C. B. Burrel v. Richmond.

10. In a judgment againſt an executor a *fieri facias* iſſued out to the ſheriff, with a *ſcire fieri* inquiry, and a *devaſtavit* was found according to the common courſe, the return whereof was, *quod diverſa bona quæ fuerunt teſtatoris, &c. habuit quæ elongavit & in uſum ſuum proprium convertit;* it was objected againſt this return, that it was not ſaid *devaſtavit*, for in ſome caſes an executor may juſtly convert the goods to his own uſe. Hale ſaid, anciently when the ſheriff returned a *devaſtavit*, which was not found by any inquiſition, and to which there was no anſwer, it was neceſſary to *inſert the word devaſtavit*, but otherwiſe in a return upon this ſpecial writ; for if the caſe be, that he hath not waſted the goods, but only eloigned them ſo as the ſheriff cannot come at them, the executor is chargeable upon the writ *de bonis propriis*, and this return anſwers the writ. Vent. 221. Trin. 24 Car. 2. B. R. Blackamore v. Mercer.

11. In a ſcire facias with inquiry of aſſets and waſte found and returned, to which the defendant pleads a former judgment ultra quod, &c. ſo plene adminiſtravit, to which the plaintiff demurred, eſpecially becauſe the waſte is not traverſed, which is the point of the inquiſition; per Cur. it ought to be traverſed, albeit on a ſcire facias on a judgment plene adminiſtravit be a good plea without traverſe of the ſuppoſed waſte in the count; but here the waſte being returned it is otherwiſe. Sed adjornatur. 3 Keb. 187, 188. pl. 45. Trin. 25 Car. 2. B. R. Bold v. Rice.

3 Keb. 198. pl. 46. S.C. adjudged for the plaintiff.

12. If

12. If feme executrix ſurvives her baron ſhe ſhall be charged for waſte committed by the baron, but not for the coſts recovered againſt the baron de bonis propriis. 2 Lev. 161. Hill. 27 & 28 Car. 2. B. R. Horſey v. Daniel.

[313] 13. In a devaſtavit an inventory, though not exhibited by the party defendant, but by commiſſioners on a commiſſion out of the ſpiritual court, &c. was allowed for *evidence*, and if defendant do not, or will not exhibit an inventory, it ſhall be taken *pro confeſſo* that he has aſſets; per Pemberton Ch. J. 2 Show. 163. pl. 152. Trin. 33 Car. 2. B. R. Anon.

14. On a ſpecial iſſue after verdict, it was held ill for defendant to ſay, *non devaſtavit ad valorem*, as the plaintiff had alleged, becauſe he did not ſay, *nec aliquam inde parcel'*; for if part were waſted, the plaintiff ſhall recover ſo much, as well as on a plene adminiſtravit, if aſſets be found to part of the debt. 2 Show. 447. pl. 414. Mich. 1 Jac. 2. B. R. Blanch v. Gabard.

15. Debt on bond againſt an adminiſtrator who waſtes goods and dies inteſtate, *leaving goods worth* 500 *l. and debts of his own of that value*; a ſcire facias is brought on the new ſtatute againſt his adminiſtrator, and he *pleads payment of the* 500*l. for ſimple contract debts of the waſting adminiſtrator*, and held good; for the waſting is the charge, and that is of no higher nature, and by that ſtatute he is to be in the ſame caſe with his inteſtate, and he might have paid his own debts with it. 2 Show. 485. pl. 447. Mich. 2 Jac. 2. B. R. Britton v. Buckworth.

Carth. 264. Duprat v. Teſſard. S. C. held accordingly.

16. An adminiſtrator ſhall not be compelled to find *ſpecial bail* upon a bare ſuggeſtion of a devaſtavit; but in debt upon a judgment, where a devaſtavit is actually returned by the ſheriff, he ſhall. Cumb. 206. Paſch. 5 W. & M. Dubray v. .....

Skinn. 571. pl. 15. S.C. the Court ſeemed that the return was void.—S. C. cited Arg. and remembered by Holt Ch. J. Ld. Raym. Rep. 326.

17. Upon a writ awarded to the ſheriff, upon a *devaſtavit* ſuggeſted *againſt two executors*, to inquire of a *waſting by both*; the ſheriff *returned a devaſtavit as to one, but ſaid nothing as to the other*; this being aſſigned for error after judgment upon a verdict was held to be aided by the verdict, being but an *inſufficient return, or a miſ-return*, by reaſon of the *omiſſion*; but it would have been otherwiſe, if *no return* at all had been made. 1 Salk. 363. pl. 1. Paſch. 5 W. & M. in B. R. Brook v. Ellis.

18. If executor *ſuffers judgment by default* to go againſt him, it is a confeſſion of aſſets, and the ſheriff may *on a fi. fa.* return a devaſtavit. 12 Mod. 411. Trin. 12 W. 3. Rook v. Sheriff of Saliſbury.

## Judgment.

### (Y. a) In what Caſes the Judgment ſhall be de Bonis Teſtatoris ſi, &c. Si non de Bonis Propriis.

### Damages.

[1. IF a man *recovers a certain thing*, as a certain debt, or, &c. *and over this damages* for the detinue, or otherwiſe, there the judgment ſhall be for the damages de bonis teſtatoris ſi, &c. ſi non de bonis propriis. 8 Rep. 134. MA. SHIPLEY'S CASE. 34 H. 6. 23. b. 21 H. 6. 1. 33 H. 6. 24.]

Debt againſt executors upon an obligation of their teſtator who pleaded non eſt factum, and found againſt them, and judgment was by the record that the plaintiff recover of * the goods of the deceaſed if he has. But the book at large is reported further in theſe words, and if he has not, then de bonis propriis; but theſe words are not in the record, which matter was notified by Fitzherbert and others, anno 23 H. 8. and commanded to amend the book, for it is contrary to the record, and ſo miſreported. Br. Executor, pl. 22. cites 34 H. 6. 22, 23.———Fitzh. Judgment, pl. 40. cites S. C.

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[2. If a man *recovers damages* in a detinue againſt an executor *for a detinue after the death of the teſtator*, the judgment ſhall be for the damages de bonis teſtatoris ſi, &c. Si non, &c. Contra. 14 H. 4. 29. b.]

[3. If a man *recovers* againſt an executor, *in an action where his recovery ſhall be all in damages*, there the judgment ſhall be *de bonis teſtatoris tantum.*]

[4. As if a man recover *in a quare impedit* againſt an executor, where he makes title in right of the teſtator by force of a *forged grant made to the teſtator*, the judgments ſhall be *de bonis teſtatoris tantum*, for here *all is to be recovered in damages.* (It ſeems the ſix months ought to be paſſed.) 34 H. 6. 23. b.]

[5. In *debt againſt three executors, if two are outlawed, and the third pleads fully adminiſtered*, and *aſſets found*, the judgments ſhall be *againſt all for the debt de bonis teſtatoris*, and for the *coſts againſt him only that pleaded.* M. 7 Ja. B. adjudged per Cur. upon advice. PARTRIDGE'S CASE.]

6. Debt *againſt two* as executors, who *pleaded that the teſtator died inteſtate, and the adminiſtration was committed to J. N. and they as ſervants to J. N. ſold the goods, and rendered to him an account, abſque hoc, that they adminiſtered in other manner*, and becauſe they *did not ſay, that he who committed the adminiſtration was not ordinary of that place*, therefore no plea per judicium, and judgment was of the debt and coſts of the goods of the deceaſed; and *the ſame* law, if they had *confeſſed the action*; but if they had pleaded a falſe plea, as plene adminiſtravit, &c. which had been found againſt them, then the judgment of the debt ſhall be of the goods of the deceaſed, and of the coſts and damages de bonis propriis. Br. Executor, pl. 164. cites 31 H. 6. 13.

7. *Debt*

Fitzh. Judgment, pl. 38. cites S. C. by Prisot, Danby, and Moyle.

7. *Debt againſt three* executors, the *one appeared, and pleaded plene adminiſtravit*, and the *other made default*, and the *third pleaded ne unques executor*, &c. the *judgment ſhall be againſt the executor, who pleaded plene adminiſtravit, and againſt him who made default of the goods of the deceaſed.* Br. Executor, pl. 18. cites 33 H. 6. 23 & 24.

Fitzh. Judgment, pl. 38. cites S. C.

8. *If the plea paſſes for the plaintiff againſt the firſt who pleaded*, &c. *and againſt him who pleaded ne unques executor, or non eſt factum, or other plea which bars the plaintiff for ever*, judgment ſhall be *of the goods of the deceaſed, if he has*, and *if not, de bonis propriis.* Ibid.

Fitzh. Judgment, pl. 38. cites S. C.

9. And 18 H. 6. the judgment was *of the goods of the deceaſed, of the debt and damages*, if they have, and *if not, the damages of their proper goods*, where they *confeſſed the action.* Ibid.

10. And 28 H. 6. the judgment was *of the goods of the deceaſed*, and *no judgment ſpecial againſt him who confeſſed.* Ibid.

11. And 18 H. 6. the *ſheriff returned upon a fieri facias, that the executors converted the goods in uſes ſuos proprios*, by which he had *fieri facias de bonis propriis of the debt and damages*, and after a *capias & exigent.* Ibid.

12. And 9 H. 6. one *pleaded that he had an executor, and found againſt him*, and the opinion was, that judgment ſhall be *of the goods of the deceaſed.* Ibid.

*[315] If executor pleads a falſe releaſe made to himſelf, or pleads ne unques executor, and found againſt him, in thoſe two caſes only, judgment ſhall be de bonis teſtatoris ſi habet ſi non de bonis propriis for all. Jenk. 320. pl. 23. ——An executor by no act or falſe plea ſhall be charged de bonis propriis, but where he pleads the falſe plea of ne unques executor, which utterly ouſts him from the benefit of the teſtament. Cro. J. 647. pl. 15. Mich. 20 Jac. B. R. Bull v. Wheeler.——S. P. Becauſe it is a falſity in his own knowledge, and he ought to pay a fine to the king. Cro. J. 672. Mich. 21 Jac. in caſe of Bridgman v. Lightfoot.

13. It was agreed, that *of ſuch things which go in bar for ever, and of which the executor may have perfect notice*, there, if ſuch a plea be *found againſt him*, judgment ſhall be given *of the goods of the deceaſed, if he has, and if not, de bonis propriis.* Br. Executor, pl. 22. cites 34 H. 6. 22, 23.

*14. *As* if they pleaded a *releaſe made to themſelves, or an acquittance*, or the like, or *ne unques executor, ne unques adminiſter as executor*, and it is found againſt them, there the judgment ſhall be of the goods of the deceaſed, if, &c. and if not, de bonis propriis. Ibid.

15. *But* contra where they plead a *releaſe or acquittance made to their teſtator, which they found in his cheſt, or* if they *deny the deed of their teſtator;* for they cannot have perfect notice of it, and therefore judgment ſhall not be de bonis propriis. Ibid.

16. *So* if they plead *plene adminiſtravit, & ſo riens enter mains;* for it is no bar for ever, for ſcire facias lies if they have aſſets after. Ibid.

17. *Alſo* where they plead *miſnoſmer*, or that there is *another executor alive not named* in the writ, &c. which goes to the writ, though they may have perfect notice, yet there judgment ſhall be de bonis teſtatoris tantum, and not de bonis propriis; quod nota diverſity; for a good caſe. Ibid.

But if the pleading ſuch plea is by reaſon of finding ſuch releaſe among the teſtator's writings, though forged, or never ſealed and delivered by the plaintiff as his deed, or if he pleads payment by teſtator, the judgment in either of theſe caſes ſhall not be de bonis propriis. Went. Off. Ex. 184.

So

So if executor denies the bond or bill (upon which the ſuit was grounded) to be the teſtator's deed; for in all theſe caſes, the truth not being known to him, he might honeſtly and reaſonably conceive it to be as he did plead. Went. Off. Ex. 184, 185.

But in all theſe caſes, though the debt ſhall not be adjudged upon the executor's own goods, yet the damages ſhall, in all default of the teſtator's own goods to ſatisfy them. Went. Off. Ex. 185, 186.

And in theſe caſes it was not material whether the judgment paſſed upon trial or demurrer. Went. Off. Ex. 186.

Nay, if defendant executor pleads no plea, but confeſſes the action generally, or be condemned by a non ſum informatus, the judgment is the ſame, viz. to recover the debt out of the teſtator's goods, and the damages out of the executor's goods, in default of the teſtator's. Went. Off. Ex. 186.

18. *Debt againſt three* executors; *at the diſtreſs two appeared*, and the third made default, and the *ſecond confeſſed the action*, upon which *judgment was againſt all the goods of the deceaſed*, and *before execution the plaintiff made his executor, and died, who brought ſcire facias againſt the three*, and *the two who confeſſed made default*, and *he who firſt made default appeared and pleaded ne unques executor, ne unques adminiſter as executor*, and *found againſt him*, and judgment was given of the goods of the deceaſed againſt them who made default, and the plaintiff *prayed execution of the goods of the deceaſed againſt him, who pleaded ne unques executor if he has*, &c. and *if not, de bonis propriis*: and ſo a man ſhall have two judgments for one debt; but he ſhall have but one execution; for if he has execution againſt the two, &c. then the third by this is diſcharged, and therefore judgment was entered as the plaintiff had prayed, quod nota. Br. Executor, pl. 81. cites 14 H. 7. 28, 29. and 15 H. 7. 8.

19. Where executors *plead plene adminiſtravit*, and *it is found that they have ſome in their hands, but not aſſets*, they ſhall not be charged but of that which they have of the goods of the deceaſed. Contra, where they plead ne unques executor, &c. For there they ſhall be charged de bonis propriis, if they have not de bonis teſtatoris. Br. Executors, pl. 105. cites 9 H. 7. 15.

S. P. per Kingſmil and Grevile. Br. Aſſets enter mains, pl. 5. cites S. C.

20. Judgment againſt an executor, to recover de bonis teſtatoris; the *ſheriff returned that the executor had nulla bona teſtatoris*; per Curiam a *ſcire facias ſhall not be awarded de bonis propriis* upon a ſurmiſe of the plaintiff of a devaſtavit, nor in any caſe where the judgment is de bonis teſtatoris *unleſs* it be *upon the return of the ſheriff where he returns a devaſtavit*. Cro. E. 530. pl. 61. Mich. 38 & 39 Eliz. C. B. Aldworth v. Peel. [316]

21. In debt againſt an executor the plaintiff recovers, and a *fieri facias de bonis teſtatoris*, and upon that the *ſheriff returns, that the defendant had not any goods of the teſtator's tempore judicii, nor after*; the *plaintiff comes* to the Court, *and ſurmiſes the defendant had waſted the goods, and prays a writ to the ſheriff to inquire*. But after the very matter being moved at the Court, by the Court a *ſuperſedeas was granted, for it was out of the Court* and without precedent, juſtice Williams being only of the contrary opinion, and cites the 9 H. 6. 57. that he may have a ſpecial writ, and alſo the caſe between Haworth and Peele. Noy, 11. Hill. 2 Jac. B. R. Brook v. Smith.

## (Z. a) By what Names Actions lie againſt Executors.

Br. Executor, pl. 99. cites S. C. accordingly. —Br. Joinder in Action, pl. 82. cites S. C. ——Fitzh. Executors, pl. 29. cites S. C.

[1. ACTION does not lie *againſt executor and executor of executor*, for this is repugnant. For *ſurvivor* ſhall have all. But if the *executor of the executor adminiſters with the other*, action lies againſt both *by name of executor*. 39 H. 6. 45. b. 46.]

2. Executor ſhall not be *vouched by grant of a ward by the teſtator*, though he *binds him, his heirs, and aſſigns, to warranty*. Br. Executor, pl. 154. cites 3 E. 2. and Fitzh. Voucher, 212.

3. T. biſhop of E. brought writ of debt againſt R. M. executor of the teſtament of J. archbiſhop of C. adminiſtrator of S. late biſhop of E. Quære, if debt lies *againſt executor of adminiſtrator*; but where ſeveral are executors, and ſome adminiſter, and ſome not, debt lies againſt thoſe who adminiſter well enough. Br. Executor, pl. 83. cites 24 E. 3. 54.

4. *Covenant* againſt *adminiſtrator of aſſignee of a term generally in his own name* upon a covenant in the original demiſe to repair, and a breach in his time; and agreed firſt, that this covenant ran with the land, and *bound the poſſeſſor without the word aſſigns*; cites 5 Co. 15. and Dean and Chapter of Windſor's caſe, Mo. 339. 1 Cro. 229. Jo. 245. And he ſhall not ſay, I ſhall not be charged for my own wrong for *want of aſſets*; for it is his *own act to adminiſter*, and he is preſumed to have known the covenant annexed to the leaſes, as well as executors under pain of devaſtavit are obliged to take notice of their teſtator's debts by bonds, and give preference of payment to them; and he might have *diſcharged himſelf by aſſigning over before breach*; and by the ſame reaſon that he ſhould be charged for the rent de bonis propriis, ſo he ought here for the damages, and judgment for the plaintiff niſi, &c. 12 Mod. 371. Paſch. 12 W. 3. Keeling v. Morrice.

1 Salk. 296. pl. 4. S. C. the Court held it no plea in bar; for if an action is brought againſt an adminiſtrator by the name of executor, and judgment had therein, this judgment may be pleaded in bar to another action brought againſt him as adminiſtrator. ——Comb. 220. S. C. accordingly by Holt Ch. J. ——12 Mod. 46. S. C. held accordingly, and that the caſe in Dy. 305. b. is not law.

5. *Action* was brought *againſt one as adminiſtrator, who pleaded that he was executor*, and upon demurrer adjudged for the plaintiff, becauſe *it was only in abatement*. For the matter was if he be chargeable or not, and though it was ſaid that this was well pleaded in bar to the action as in Robinſon's caſe, 5 Rep. 32. and that upon evidence upon ne unques executor he may give letters of adminiſtration in proof, and cited Dyer, 305. this was denied by Holt Ch. J. and Eyres cæteris tacentibus; and Holt ſaid, that notwithſtanding this he ſhall be charged, but ſaid that it is otherwiſe of *letters ad colligend' * bona defuncti*; but where one ſues as executor, the defendant may plead by way of eſtoppel, that he was adminiſtrator, &c. Skinn. 365. Mich. 5 W. & M. in B. R. Harding v. Salkeld, and cites 5 Rep. 32.

## (Z. a. 2) Pleadings. Traverſe. Good and neceſſary. In what Caſes.

1. EXECUTOR may bring *replevin* of an ox of the teſtator's, taken by theſe words, *de bove ſuo capt.* quod nota; for now no other can have thereof property. Br. Property, pl. 51. cites 24 E. 3. 35.

2. Per Priſot and Needham, a man ſhall not have anſwer *in debt by executors or adminiſtrators*, in denying the teſtament or letters of adminiſtration, but *ſhall ſay, that the teſtator did not make the plaintiff his executor*, or that *the adminiſtration was not committed to the plaintiff.* Br. Reſponder, pl. 50. cites 6 H. 6. 31.

3. In *debt againſt executor*, it is *no plea that the teſtator died inteſtate*, unleſs he traverſes the making of him executor. Br. Executor, pl. 126. cites 7 H. 6. 13.

4. In *debt againſt J. by name of executor*, and *he imparled*, he ſhall not ſay, after that he is adminiſtrator, and not executor, judgment of the writ. Br. Executor, pl. 24. cites 35 H. 6. 35, 36.

S. P. by the beſt opinion; and yet after this he ſhall ſay, ne unques executor, ne unques adminiſter as executor in bar, &c. Br. Eſtoppel, pl. 24. cites S. C.

5. A man ſhall not have traverſe to a *teſtament*, or *letters of adminiſtration*, as to ſay, that the teſtator did not make this teſtament, or that the letters are not the letters of the biſhop, or the teſtament was not proved; but he may ſay, that the *teſtator did not make him executor, or that the adminiſtration was not committed to him.* Per Needham Juſtice, and Priſot conceſſit. Br. Traverſe per, &c. pl. 157. cites 36 H. 6. 31.

Debt againſt an executor, who pleaded in abatement that he was adminiſtrator, and ought to be ſued as ſuch, and not as executor; and upon demurrer to this plea, it was objected that it was ill without a traverſe, that he was executor, or ever adminiſtered as executor; but adjudged that the plea was good without a traverſe. 5 Mod. 136. Mich. 7 W. 3. Bowers v. Cook.——1 Salk. 297. pl. 8. Fooler v. Cook. Mich. 7 W. 3. B. R. in aſſumpſit S. P. and ſeems to be S. C. and held better without a traverſe, which would be impertinent; for though the defendant ſuppoſes an intermeddling, yet it does not ſuppoſe how or in what manner, and to deny any intermeddling as executor de ſon tort, is to traverſe where is not alleged. And per Holt Ch. J. the difference is between ſuing one as executor (as in this caſe), for then there needs no traverſe, and where one is ſued as adminiſtrator to J. S. for then, if the defendant pleads he is executor, he muſt proceed and traverſe, that the ſaid J. S. died inteſtate, becauſe, unleſs there be a dying inteſtate, an action cannot be brought againſt an adminiſtrator, and to plead he was made executor, is by implication only an anſwer to the dying inteſtate.——Carth. 363. S. C. and the Court held the plea better without a traverſe; for if the truth was, that the defendant had adminiſtered in his own wrong, before adminiſtration actually granted to him, that matter ought to come in by way of replication by the other ſide.——12 Mod. 83. S. C. held accordingly.

6. *Executors get the charters* of their teſtator, and *J. N. took them. The executors releaſed to him all actions, except actions as executors*, and after they *brought action of the taking of the charter*, and the other pleaded the releaſe; and admitted that it is no bar. Brook ſays, the reaſon ſeems to be, inaſmuch as they brought this action by reaſon of the poſſeſſion of the charters, and not as executors; for the charters do not belong to the executors. Br. Executors, pl. 134. cites 39 H. 6. 15, 16.

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7. In action by executor, the defendant may *say, that the teſtator made A. and B. his executors, abſque hoc, that he made the plaintiff his executor;* per Choke and Cateſby; quod non negatur. Br. Executors, pl. 140. cites 21 E. 4. 50.

8. *Adminiſtration* is not traverſable. Br. Traverſe per, &c. pl. 382. (bis) cites Fitzh. Variance, 19.

9. *Debt* was brought *againſt J. S. as executor, and* pending this action, J. D. brought debt againſt him *as adminiſtrator* for a true debt, (whereas in truth he *was executor*,) J. S. confeſſed the latter action, and pleads this recovery in bar of the firſt action; and it was reſolved to be no good plea. 1ſt, Becauſe the recovery was had againſt him as adminiſtrator, and ſo is void, although this had been only a plea to the writ, and a ſtranger ſhall not falſify that which is only to the writ. 2dly, He that firſt ſueth ſhall firſt be ſerved, and the executor might have pleaded the firſt action againſt him that brought the ſecond. Cro. E. 41. pl. 5. Trin. 27 Eliz. C. B. Anon.

10. An *adminiſtrator may declare of goods taken out of his own poſſeſſion, though he never was poſſeſſed of them;* for of tranſitory things the law caſts upon him a ſufficient poſſeſſion to maintain an action poſſeſſory, as the lord before ſeiſin may have a raviſhment of ward, &c. But *otherwiſe* it is if *one takes the goods of the inteſtate out of his poſſeſſion before he dies*, for then nothing but a bare right comes to the adminiſtrator. Godb. 34. pl. 41. Paſch. 37 Eliz. C. B. per tot. Cur. Carter v. Crofts.

11. In *trover by an executor*, he *declared that he was poſſeſſed of* 40*l. in quadam crumena exiſtent' ut de bonis ſuis propriis, which he loſt, and the defendant found and converted it to his own uſe in retardationem executionis teſtamenti, &c. Error was aſſigned that this was contrariant*, the goods being his proper goods, and yet that they ſhould be converted in retardationem, &c. But all the juſtices, præter Fenner, held otherwiſe; for the executor is poſſeſſed of the teſtator's goods ut de bonis ſuis propriis, and may declare ſo, and the converſion of them is in retardationem executionis teſtamenti. Cro. E. 568. pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodſkirt.

12. Error of a judgment, becauſe the plaintiff brought *debt as adminiſtration, and ſuppoſed the adminiſtration to be committed to him by ſuch a biſhop*, but doth *not ſay, loci illius ordinarius, nor cui adminiſtratio pertinet;* it was holden no error, and the judgment affirmed; for in a declaration it is well enough, but not in a bar. Cro. E. 838. pl. 12. Trin. 43 Eliz. B. R. Chard v. Bird.

13. If executor brings an action of *treſpaſs for taking goods which were the teſtator's* at the time of his death, he *need not ſet forth that they were taken extra cuſtodiam ſuam;* for it ſhall be intended that the goods were in cuſtodia ſua, becauſe the poſſeſſion is caſt on him by the death of the teſtator. Cro. J. 113. pl. 11. Hill. 3 Jac. B. R. Adams v. Cheverel.

Bulſt. 200. S. C. and judgment reverſed,

14. Error of a judgment in *aſſumpſit* brought as *executor*, becauſe though he ſhews himſelf to be executor to him to whom the promiſe was made, yet he *ſaith not teſtamentum hic in curia prolatum.*

This

This was held to be matter of ſubſtance and error; and the judgment reverſed. Cro. J. 299. pl. 1. Paſch. 10 Jac. B. R. Browning v. Fuller.

and Williams J. cited it as adjudged accordingly in Sir John Savage's caſe.

15. Caſe brought upon a *promiſe* made *to the inteſtate*, and in the *count omits to ſhew the adminiſtration*, and after trial that fault was moved in arreſt of judgment; and the whole court was of opinion, that he ſhould not have his judgment, for it did not appear that he was adminiſtrator, for at the common law no adminiſtration lay, but the ordinary ought to have the goods. Brownl. 9. Trin. 12 Jac. Cope and Ux' v. Lewyn. [319]

16. A. brought *debt as executor* againſt B. and counts that teſtator made his will, and plaintiff executor at D. and died. *Plaintiff pleads that teſtator died inteſtate at S. and adminiſtration was granted to him, &c. abſque hoc that A. is executor.* Whitlock held this traverſe not good, but that he *ought to have traverſed the making the will*; and Coke Ch. J. cited 7 E. 4. that a traverſe is not neceſſary. Roll. Rep. 395. pl. 18. Trin. 14 Jac. B. R. Parry v. Parry.

S. C. and S.P. 3 Bulſt. 250. Adjudged not good; but if any traverſe at all was to be taken, it ſhould be quod conſtituit eum executorem; but the books queſtion whether, in ſuch caſe, any traverſe ought to be, and cites 10 H. 6. 26. 9 E. 4. 33. 4 H. 7. 13. ——Debt by A. as adminiſtrator, and 8zl. recovered againſt B. Afterwards B. being in execution eſcaped, and then A. as executor brought debt on eſcape. It was held, that if one recover as adminiſtrator where there is an executor, the party againſt whom the recovery is ſhall have audita querela, ſuppoſing he had no right to recover, as 2 R. 3. 8. a multo fortiore where it appears by their own ſhewing that there is an executor, he cannot found an action upon that which he did as adminiſtrator, and though one and the ſame perſon brings this action as executor who firſt recovered as adminiſtrator, and ſo quaſi a privity therein, which is the principal doubt of this caſe, as Doderidge ſaid, (for if he had made a releaſe he might well have barred that action, or if the money had been levied he might well have retained it,) yet becauſe it appears that he ought not to have an action in this manner, all the Court held the recovery was erroneous, and ſo a judgment in C. B. reverſed. ——Cro. J. 394. pl. 6. Hill. 13 Jac. B. R. Slingſby v. Lambert. —— Godb. 262. pl. 361. Lambert v. Slingſby, S. C. the queſtion was, if he might maintain an action againſt the ſheriff for the eſcape as executor when he was only adminiſtrator at the time? and the Court held that the action would lie, and that the ſame debt ſhould be aſſets in the executor's hands. —— Roll. Rep. 276. pl. 51. S. C. adjornatur. But the reporter ſays, he heard that the caſe was moved again, Coke being preſent, and it was adjudged that the action was not maintainable.—3 Bulſt. 112. S. C. Doderidge and Coke held that the action lay, but Houghton e contra; et adjornatur. The reporter ſays, he heard that the ſame was ended by agreement between the parties.

17. *Debt by an adminiſtrator for arrearages of rent upon a leaſe made by the inteſtate*, and declares that adminiſtration was committed by the archbiſhop, but did *not ſay, profert hic in curia literas adminiſtrationis.* Reſolved that the not ſhewing the letters of adminiſtration was matter of ſubſtance, and ought to be ſhewed by the plaintiff to enable him to his action, and the defendant ſhall take advantage thereof at any time; and adjudged for the defendant. Cro. J. 409. pl. 9. Mich. 14 Jac. B. R. Sir John Cuts v. Bennet.

3 Bulſt. 223. S. C. and judgment quod querens nil capias per billam.

18. In *ſcire facias on judgment in B. R. by executor ſhewing teſtator recovered againſt ſheriff of S. and that part is unſatisfied*; the defendant *pleaded that adminiſtration was committed to J. S.* not traverſing abſque hoc that the plaintiff was executor, and this after imparlance is ill; per Cur. judgment for the plaintiff on demurrer by

So to ſay that H. died inteſtate without traverſe, abſque hoc that he made a will. Ibid. cites Pl. Com.

Greisbrook v. Fox. by the plaintiff. Keb. 381. pl. 87. Mich. 14 Car. 2. B. R. Horseman v. Waters.

19. The *administratrix* of *B. brought* an action of *debt against the defendant, as executrix of R. G. upon a bond executed by him for the payment of* 200 *l. to B.* The defendant *pleaded in bar that the said R. G. died intestate, and that administration was granted to her, and that she ought to be named administratrix* and not executrix; adjudged in B. R. and affirmed in error in Cam. Scacc. that this was an ill plea, because the defendant did *not traverse that she had administered any of the goods of the intestate before administration was granted to her.* Lutw. 889. 891. Trin. 2 Jac. 2. Grey v. Thorogood.

[ 320 ] 21. *Scire facias* by executors upon a judgment obtained by the testator; and upon a general demurrer it was insisted, that the practice of this court in such case is, that the plaintiffs in the scire facias should insert this clause, (viz.) *profert in curia literas testamentarias*, &c. which being omitted, the writ is not good. To which it was answered, that the practice is to insert that clause at the conclusion, and not in the middle of the writ, and here it is inserted at the conclusion. But the Court held both forms to be good, and that in C. B. this clause is always inserted in the end. Judgment for the plaintiff. Carth. 69, 70. Mich. 1 W. & M. in B. R. Bosworth v. Ridgley.

22. *Debt by an administrator.* Defendant *pleaded in abatement that A. made his will, which after administration granted was proved by the executor.* Upon which plaintiff demurred. And the question was, if the plea was good *without the traverse, absque hoc that A. died intestate?* It was resolved in this case by the Court without any difficulty, that the plaintiff ought to have traversed, absque hoc that the said A. died intestate, for *the plea is not a full confession and avoidance of the plaintiff's title without such traverse;* for as the plaintiff alleges himself to be administrator of A. and the defendant says that A. made his will, which was proved, this is not an absolute avoidance of the plaintiff's title, but only by argument or implication, and perhaps the probate was afterwards revoked, or another will made, of which the plaintiff shall have the advantage upon the issue tried, and though the producing the will under probate is conclusive evidence against the plaintiff, who cannot prove that there was no such will, or that it was forged, yet it is but evidence, and there are many cases where what is sufficient evidence to prove a thing, is not sufficient to be pleaded, as in trover a demand and refusal is sufficient evidence to be pleaded. Comyns's Rep. 156, 157. pl. 104. Pasch. 7 Ann. Landon v. Bessingham.

23. *Currency of accounts* prevents the statute of limitations. MS. Tab. tit. Limitation, cites 28 March 1711. Ormston v. Hamilton.

24. In a *scire fieri inquiry*, if the *executor of A. recovers a judgment against B. as administrator of J. S.* it need not be expressly *averred that A. is dead.* 2 Ld. Raym. Rep. 1395. Trin. 11 Geo. B. R. in case of Morfoot v. Chivers & Ux'.

25. Statute of limitation was *pleaded by an executor*, where *teſtater had deviſed all his eſtate*, both *real and perſonal, for payment of his debts*. Ld. Chancellor over-ruled the plea; but the Houſe of Lords ordered it to ſtand for an anſwer, with liberty to except, and ſaved the benefit of the plea to the hearing. MS. Tab. cites 7 Feb. 1727. Ld. Strafford v. Blakeway.

## (Z. a. 3) Actions by Executor and Pleadings. And in what Caſes it muſt be in the Debet and Detinet.

1. DEBT *againſt adminiſtrator*. The *plaintiff recovered upon plene adminiſtravit pleaded*, and *brought debt upon the ſame recovery in the debet and detinet*, and therefore took nothing by his writ by award. Br. Adminiſtrator, pl. 17. cites 7 H. 4. 10. 11 H. 4. 56.

2. *Quare if* he had recovered *upon ne unques executor* pleaded, [ 321 ] *or not the deed of the teſtator*. Ibid.

3. *And* ſee 11 H. 6. 7. 36 and 37. where it is *againſt two, and the baron and feme as executor; one and the feme appeared, and* the *baron not;* ſhe ſhall not anſwer, nor in this caſe ſhall the other be compelled to anſwer, by reaſon that the writ is in the debet and detinet, which is out of the caſe of the ſtatute, for it cannot be intended to charge them as executors or adminiſtrators by this form. Per Thirn. Ch. J. Ibid.

4. Where *leſſee for years is in arrears* of his rent, and *makes an executor and dies*, if *the executor occupies* the land, *he ſhall render* the arrears; *contra if he waives* it and does not occupy. Per Aſcue J. Br. Barre, pl. 27. cites 21 H. 6. 24.

5. Debt by executors *upon arrears of account made by aſſignment of themſelves* after the death of the teſtator. The writ was quos el detinet, and not debet, and therefore challenged and much argued; & non allocatur, but the writ awarded good; for *in every caſe where executors are compelled to name themſelves executors*, the writ ſhall be detinet only, and they cannot declare upon the arrears of account, which account is due to their teſtator, without naming themſelves executors, and therefore the writ good by award. Br. Dette, pl. 9. cites 20 H. 6. 4.

6. *But where the* executors *ſell the goods, and take the obligation to themſelves or contract*, there the writ ſhall be debet and detinet; note the difference. Ibid.

7. In *debt againſt executors for the debt of the teſtator*, if the writ be *in the debet and detinet*, it is *not amendable*. Per Cur. Thel. Dig. 225. lib. 16. cap. 6. ſ. 24. cites Mich. 22 E. 4. 21.

9. Executor ſhall have writ of *debt of arrearages of annuity due to the teſtator in his life*, and the writ ſhall be *in the detinet*, but the writ of annuity itſelf is in the debet, and ſo ſee that debt lies of annuity where the annuity continues, and the ſame law elſewhere where the annuity is extinct by the act of the party himſelf, yet

debt lies of arrearages due before. Br. Executor, pl. 168. cites 2 R. 3. 22.

* S. P. and therefore he who brings action of debt as executor of

9. Debt by executors ſhall be *in the* * *detinet only*, and not in the debet and detinet, *as well of a ſum* which is *due after the death of teſtator, as of that which was due in his time;* quod nota. Br Executor, pl. 1. cites 19 H. 8. 3.

arrearages of rent-charge due to the teſtator by the ſtatute 32 H. 8. the writ ſhall ſay detinet. Br. Executor, pl. 119.

Sav. 130. pl. 199. S. C. and by three barons contra Periam Ch. B. the new tort is founded upon the firſt debt, and when they recover for this eſcape the damages accordingly ſhall be aſſets; and judgment recovered.

10. *Debt upon an eſcape, and declared that the plaintiff as executor recovered againſt L. and had him in execution, and the defendants ſuffered him to eſcape*, and counted in this action in the debet and detinet; the defendants pleaded nihil debent, and found for the plaintiff. It was *moved* in ſtay of judgment, *that the action was not well brought, for the firſt was in the detinet, and ſo this action grounded upon the record ought to be, and to purſue it.* It was the opinion of two juſtices contra Periam, that the ground of the action is the recovery as executors, and the wrong is to them in that right, and therefore the action is to be brought in the detinet only, and ſo it was afterwards adjudged. Cro. E. 326, 327. pl. 4. Paſch. 36 Eliz. B. R. Hitchcock v. Skinner and Lacy.

Jenk. 300. pl. 62. cites S. C.

11. In *eſcape* by an executor againſt a gaoler after a recovery by the executor, the action ought to be in the detinet only. Hob. 272. Lancaſtell v. Sidley.

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S. C. cited Cro. J. 645. in caſe of Holman v. Chute.

12. *Executor got judgment* againſt his teſtator's debtor, and had him in execution, and ſheriff let him *eſcape*. In debt againſt the ſheriff it ought to be in the detinet only, for though the judgment was had by the executor, yet it was for a debt of his teſtator's. Per all the juſtices and barons, except Hutton J. who doubted. Cro. J. 545. pl. 5. Mich. 17 Jac. B. R. Reynell v. Lancaſtle.

13. *And* in the ſame caſe it was held not to be matter of form only, but *matter of ſubſtance, and not aided by the ſtatute*, as it was reſolved, 5 Rep. 35. in Playter's caſe, and 36. in Walcot's caſe. Cro. J. 546. ut ſupra.

14. And it was there further ſaid, that an executor *can never have an action in the detinet, but where teſtator might have had the ſame* action. Cro. J. 546. ut ſupra.

15. An executor never ſhall be forced to bring his action in the detinet, only where he *need not name himſelf executor;* it was ſo ſaid, Winch. 80. Paſch. 22 Jac. C. B. in caſe of Holman v. Tuke.

Hutton J. took a difference between a perſonal contract and a real. Winch 80.

16. In *debt* by an executor, the count was *on a leaſe made by himſelf by indenture* to J. S. *as executor*, naming himſelf executor in the leaſe, and this was of *land delivered to him in execution* by extent upon a ſtatute made to his teſtator. The action was brought in the debet and detinet, and held good; for it is *of his own contract*, and though he be named as executor in the contract, yet the action is not brought by him as executor. See Winch. 80. Holman v. Tuke, and Cro. J. 685. S. C. Paſch. 22 Jac. C. B.

17. If

17. If executor is ſued for *rent behind after teſtator's death*, upon a leaſe for years made to teſtator, and by him left to his executor, this ſhall be adjudged and levied *de bonis propriis*, for ſo much of the profits as the rent amounted to ſhall be accounted as his own goods, and not his teſtator's, and therefore he is to be ſued as well in the debet as in the detinet. Went. Off. Ex. 192.

18. *So* if any thing delivered to or *detained by teſtator* come to his hands, *and executor ſtill detains the ſame after demand*, and be thereupon ſued in an action of detinue; for this is his own act. Went. Off. Ex. 192.

19. *Debt againſt an executor on a leaſe to the teſtator.* Reſolved, that where *part of the arrears demanded were due in the time of the teſtator, and part after his deceaſe*, the action in the detinet was good for the whole, as well as if all had been due after the death of the teſtator; and that after a verdict, quod non detinet, the land ſhall not be intended of any value, as it is well known in theſe times, in many places lands have been of no value, yet the executor is liable to the rent as far as he has aſſets; and clearly, if he has aſſets, he cannot waive his term. Per Roll. All. 76. Trin. 24 Car. B. R. Corniſh v. Cawſey.

Sty. 119. Corniſh v. Cowſey, S. C. Cur. adviſare vult.—Went. Off. Ex. 119. S. P. and when his aſſets fail, he muſt then waive the poſſeſſion, giving notice to the reverſioner; yet this he ſays he leaves a quære, though his opinion is ſuch.

20. In *debt* againſt an executor *on leaſe for years arrear in his own time*, the defendant demurred ſpecially, becauſe it was in the debet and detinet, and per Cur. it is good both ways; and judgment for the plaintiff. 2 Keb. 788. pl. 24. Trin. 23 Car. 2. Temple v. Foreſt.

21. In *debt againſt* the defendant, *adminiſtrator as the aſſignee* of Y. after verdict, Simſon excepted in arreſt of judgment, that though an action lieth in the debet and detinet, by reaſon of taking of profits, yet the adminiſtrator is not chargeable as aſſignee, ſed non allocatur, this being but the miſ-titling of the declaration, which being *by bill, and not by original*, the adminiſtrator or executor is quodam modo aſſignee; and judgment pro quer. 2 Keb. 819. pl. 27. Mich. 23 Car. 2. B. R. Sewell v. Young.

22. If an *executor aſſigns over*, he may ſtill be *charged for rent in the detinet*, if he have aſſets, *but not in the debet and detinet, but for the time that he occupies.* Freem. Rep. 338. Trin. 1673. Boulton v. Canon. [323]

23. J. S. *leſſee for years rendering rent, aſſigns, and dies;* his *executor, if he hath aſſets, may be charged in the detinet, or in covenant;* if there be a *covenant* to repair, or *not to aſſign*, the executor is chargeable after aſſignment, but not de bonis propriis. Adjornatur. Freem. Rep. 338. in pl. 417. Trin. 1673. in caſe of Boulton v. Canon.

24. An action of debt in the debet and detinet was brought *againſt an executor of a leſſee for years*, and he *pleads* that before the action brought he had *fully adminiſtered, and that his term was of leſs value than the rent, and that he had offered to ſurrender.* Quære, whether if a rent be of greater value than the land, the executor ſhall be charged in debet and detinet? and it ſeemed he ſhall not, but

Vent. 271. S. C. but becauſe the defendant waived the material part of his plea, viz. that the rent exceed-

but ſhall be charged in the detinet only, for there the judgment will be de bonis teſtatoris only. Freem. Rep. 393, 394. pl. 510. Paſch. 1675. Boulton v. Canon.

ed the value of the land, and relied upon the tender of a ſurrender which was nothing to the purpoſe, judgment was given for the plaintiff. ——3 Keb. 493. pl. 38. S. C. & S. P. adjudged for the plaintiff niſi. ——Pollexf. 125 to 134. Bolton v. Carham. S. C. argued, and judgment for the plaintiff.

25. When a *leſſee* for years *dies*, and *his executor enters*, it is in the election of the leſſor to *charge him either as executor in the detinet only*, *or elſe as he takes the profits* (and is as it were an aſſignee) *in the debet and detinet*; and if he charges him in the detinet only, judgment ſhall be de bonis teſtatoris. Per Hale Ch. J. Freem. Rep. 337. pl. 417. Trin. 1673. in B. R. Anon.

25. Debt was brought in debet and detinet againſt an adminiſtrator *for rent incurred upon a term for years in his own time*. He *pleads fully adminiſtered*. The plaintiff demurs. But it was agreed, that if an *executor brings an action of debt for rent upon a leaſe made by the teſtator*, *it muſt be in the detinet only*; but if an executor makes a leaſe himſelf, it muſt be in the debet and detinet. Freem. Rep. 171. pl. 183. Trin. 1674. C. B. Sackvill v. Evans.

2 Lev. 209. S. C. ad judged accordingly in debt on a bond; but

26. It was held per Cur. that an action of *debt upon a bond* would not lie againſt an executor in the debet and detinet *upon a bare ſuggeſtion of a devaſtavit*; but *otherwiſe* it is *of a judgment*. Freem. Rep. 458. pl. 623. Mich. 1677. Ent v. Withers.

if the action is brought on a judgment, and counts of a devaſtavit, it lies well. —— S. C. cited Lev. 147. in caſe of Corey v. Thinne, that it lies not in debt on an obligation. ——2 Lev. 145. S. C. cited by the name of Eaſt v. Withers as adjudged accordingly.

27. A. *poſſeſſed of a term* for years *makes an under-leaſe* for part of the years, reſerving a rent, and makes his executor and dies. His *executor brings an action for the rent* in the debet and detinet; and after verdict it was moved in arreſt of judgment that it ſhould have been in the detinet, for that the rent is incident to the reverſion, and that he hath the reverſion as executor, and therefore the action ſhall be intended to be brought as executor, and ſo ought to be in the detinet; but the Court ſaid, of ſuch *things as lie in manual occupation*, or whereof manual occupation hath been had, as goods, &c. the executor is *not bound to name himſelf executor*, and then it will be good in the debet and detinet, *but for a choſe in action* it ſhall always be in the detinet, for that till it be recovered it is not aſſets, and for this he ſhall always name himſelf executor; but a leaſe for years is aſſets in the hands of the executor for the whole leaſe at firſt, therefore he need not name himſelf

[ 324 ] executor; but if he doth name himſelf executor, he muſt then ſay detinet only; therefore judgment for the plaintiff niſi. Skin. 5. Mich. 33 Car. 2. B. R. Prattle v. King.

28. Debt againſt the defendant adminiſtrator, and *declares upon a demiſe to the inteſtate for 129 l. due in the life of the inteſtate in the detinet, and for 64 l. in his own time in the debet and detinet.* The defendant demurred; and adjudged the action did not lie to charge him in the detinet for part, and the debet and detinet for the

the other part, which requires ſeveral judgments, viz. de bonis propriis for the arrears in his own time, and de bonis inteſtati for the arrears due before his death, and the ſevering of the ſaid ſums in the declaration is not ſufficient, but he ought to have ſeveral actions. 3 Lev. pl. 74. Mich. 34 Car. 2. C. B. Salter v. Cobbold.

29. Whether *debt by executor for an eſcape of one in execution of a judgment of the teſtator* in the debet and detinet be helped by verdict? adjornatur. 12 Mod. 565. Mich. 13 W. 3. in the caſe of Holden v. Sutton. Ld. Raym. Rep. 698. S. C. the Court ſeemed that it was not good, nor aided by the ſtatute 16 & 17 Car. 2. cap. 8. becauſe it would alter the nature of the action, and therefore the right was not tried; and judgment ſtayed niſi, &c.

30. If an executor has a term, *and the premiſes are of leſs value than the rent reſerved* thereon, in an action brought againſt him in the debet and detinet, he may *plead the ſpecial matter*, viz. that he *has no aſſets, and that the land is of leſs value* than the rent, and demand judgment if he ought not to be charged in the detinet tantum. This Holt Ch. J. ſaid was his opinion, and that Hale was of the ſame opinion, and it was but reaſonable, becauſe an executor could not waive for the term only; for he muſt renounce the executorſhip in toto or not at all. 1 Salk. 297. pl. 6. Paſch. 11 W. 3. B. R. Billinghurſt v. Speerman.

31. *Debt* was brought in the debet and detinet againſt the defendant *upon a judgment* had *againſt him as adminiſtrator, and ſuggeſts a devaſtavit* committed by him. The defendant *pleads that* the *plaintiff ſued* againſt him *as adminiſtrator and obtained judgment, and* that afterwards, and *before this action brought, the adminiſtration* committed *was repealed, and committed to one Law, to whom he paid the reſidue of the goods of the inteſtate, having firſt ſatisfied himſelf of* 20*l.* which the inteſtate owed the defendant for wages. The Court took exception to this pleading, becauſe the defendant *did not traverſe the devaſtavit*; for without waſte the defendant could not be charged in the debet and detinet, and this is the uſual way of declaring ſince the 20 Car. 2. and cites WHEATLY v. LANE. 1 Sand. 216. 1 Lev. 255. So they deſired Serjeant Hall to take time to conſider of it; for the giſt of the action is the waſte, which you ſhould traverſe; but if the fact be with you, perhaps we may allow you to amend your plea upon payment of coſts; therefore you do well to conſider of it. Holt's Rep. 46, 47. pl. 11. Mich. 5 Ann. Bonner v. Underwood.

32. *Debt on a bond againſt an executor* as executor muſt be in the detinet tantum. Trin. 11 Ann. B. R. Coppleſtone v. Clowter.

33. *Debt on bond* given *to the executors of A. for a debt by ſimple contract due to A.* Declaration was quod defendens cognovit ſe debere to them as executors of A. Upon demurrer exception was, that it ought to have been in the detinet tantum, not debet and detinet. Sed Cur. contra, for the executors may ſay, you are indebted to me by bond, and you detain it from me, but if bond were to the teſtator, they could only ſay that it was detained. Trin. 3 Geo. B. R.

## (Z. a. 4) In what Caſes he muſt name himſelf Executor.

Br. Executors, pl. 90. cites S. C.

1. IF the ordinary *commits the adminiſtration to the executors upon refuſal by them before that they have adminiſtered*, they ſhall be impleaded by names of adminiſtrators; contra if it be after the adminiſtration; for then the refuſal is void. Br. Ordinary, pl. 13. cites 9 E. 4. 33.

2. If *executors aſſign auditors*, and the *bailiff is found in arrearages*, and the *executors bring action of debt upon the arrearages of account*, they ſhall be named executors, though they aſſign the auditors; per Keble. Br. Executor, pl. 170. cites 2 H. 7. 15. and 6 H. 7. 6.

3. *Contra* where executors bring *treſpaſs of goods of their teſtator, taken out of their poſſeſſion, there they need not be named executors.* Ibid.

4. *So in* action of *detinue* brought *by them of their own bailment.* Ibid.

5. *Or* action of *account againſt their own bailiff*, there they need not be named executors; note a *diverſity*; for in the one caſe the thing is a *choſe en action* which never was in their poſſeſſion, and in the other caſe it was by reaſon of their *proper poſſeſſion.* Nota bene. Ibid.

## (Z. a. 5) Pleadings in Actions againſt Adminiſtrators.

### Alleging by whom the Adminiſtration was granted.

Br. Adminiſtrator, pl. 16. cites S. C.

1. DEBT againſt adminiſtrators, iſſue was taken *that the adminiſtration was not committed to him by the ordinary*, and held good iſſue. Br. Negativa, &c. pl. 9. cites 7 H. 4. 10.

2. *Debt againſt an adminiſtrator.* The *plaintiff is not bound to count that the adminiſtration was committed to the defendant by the ordinary*; quod nota; by which he was compelled to anſwer. *Otherwiſe* it ſeems *where the adminiſtrator is plaintiff.* Br. Adminiſtrator, pl. 22. cites 6 H. 5. 6.

S. P. for if he be not ordinary there, he may ſay that another is ordinary there, abſque hoc that the abbot is ordinary there, per Moile, as where a vill extends into two dioceſes, &c. Br. Adminiſtrator, pl. 9. cites S. C.

3. Debt againſt adminiſtrator, and *counted that the abbot of W. ordinary there, committed* the adminiſtration; Laicon demanded judgment of the count, becauſe he *did not ſhew how the abbot is ordinary there*; and non allocatur. Br. Count, pl. 25. cites 35 H. 6. 46.

Br. Count, pl. 21. cites S. C.

4. Adminiſtrator in his count ought to *ſhew in what place the adminiſtration was committed* to him; per opinionem Curiæ. Contra

tra of executors; for a man may be executor without making, as de ſon tort demeſne. Br. Adminiſtrator, pl. 8. cites 35 H. 6. 31.

5. In *debt againſt adminiſtrator, it is no plea that the adminiſtration was committed to him by the archdeacon, abſque hoc that it was committed to him by the biſhop, without ſhewing how the archdeacon has power to do it,* by which he *ſhewed how the archdeacon and his predeceſſors have had this authority time out of mind, abſque hoc,* ut ſupra; judgment of the writ; and *no plea if he had not taken the abſque hoc;* quod nota; by which the plaintiff maintained his writ that it was committed by the biſhop. Br. Adminiſtrator, pl. 31. cites 37 H. 6. 27, 28. [326]

6. It is a good plea that the adminiſtration was committed to him *by another biſhop, and not by the biſhop by whom the plaintiff ſuppoſes;* judgment of the writ. Br. Traverſe per, &c. pl. 141. cites 37 H. 6. 27, 28.

7. In debt by adminiſtrators, the *defendant ſaid, that the deceaſed made executors who adminiſtered,* and it was adjudged that he *ought to ſay* further, *abſque hoc that he died inteſtate.* Br. Traverſe per, &c. pl. 181. cites 4 H. 7. 13.

8. Where a man declares on an adminiſtration committed *of all the goods in Kent and Suſſex by the archbiſhop, without ſaying how, either as ordinary, or by virtue of his prerogative;* this was held to be a material exception. But it being afterwards alleged that all the precedents in this court and in C. B. are ſo in general, without ſhewing how, and becauſe they would not change the precedents, they diſallowed the exception. Cro. E. 6. pl. 2. Trin. 24 Eliz. C. B. Dorrell v. Collins.

Cro. E. 102. pl. 8. Trin. 30 Eliz. B. R. Lacy and Smith S. P. as to an adminiſtration granted by A. B. official of the biſhop of Peterborough, without ſhewing that he was ordinary of the place, or that the granting of adminiſtration did belong to him, and this after verdict was alleged in arreſt of judgment, yet by reaſon of ſeveral precedents the plaintiff had judgment. ——S. C. cited 1 Salk. 41. per Cur.

9. An adminiſtrator declared on an adminiſtration granted to him *per W. L. vicarium generalem in ſpiritualibus epiſcopi Roffen', without ſaying, loci iſtius ordinarium,* and held well, for ſuch a vicar amounts to a chancellor; for in truth the chancellor is vicar-general to the biſhop. Leon. 312. pl. 435. Mich. 32 Eliz. C. B. Gillam v. Lovelace.

10. In action brought by an adminiſtrator, he did *not ſhew in what place adminiſtration was granted to him;* yet the declaration is good, but it would not be good in a bar. Cro. E. 283. pl. 5. Trin. 34 Eliz. B. R. Piers v. Turner.

11. An adminiſtrator *declared on an adminiſtration per Andrew Vane, ſacræ theologiæ doctorem,* and did *not ſay, loci iſtius ordinarium, or cui de jure pertinuit;* and becauſe it was in a declaration which ought to be certain, and he is not a biſhop, nor ſuch a perſon as may be intended to be the ordinary, the judgment was reverſed. Cro. E. 431. pl. 39. Mich. 37 & 38 Eliz. B. R. Morgan v. Williams.

Mo. 367. pl. 504. S. C. judgment reverſed.

12. The plaintiff declared on an adminiſtration committed to him by the *dean of Litchfield, and did not ſay by what authority, nor that he was loci illius ordinarius,* and this was held ill; *for the Court intends*

*intends not his authority, it being ſpecial, without ſhewing it; but in caſe of a biſhop, it ſhall be intended*, and ſo are the precedents; but in a bar or replication it is vitious. Cro. E. 791. pl. 34. Mich. 42 & 43 Eliz. C. B. Temple v. Temple.

13. Debt by an adminiſtrator. The plaintiff *declared that the adminiſtration was committed to him by the biſhop of St. David's*, but *ſaith not loci illius ordinarius, nor cui adminiſtratio pertinet*, yet the Court ſaid it is intended that he is ordinary, unleſs adminiſtration be alleged to be committed by one who hath a peculiar juriſdiction. Cro. E. 879. pl. 9. Paſch. 44 Eliz. B. R. Skidmore v. Winſton.

2 Jo. 1. cites S. C. and Vet. Intrat. 300. 302. but in the principal caſe there, Hill. 22 Car. 2. C. B. Thorold v. Baily, in which the defendant demurred, becauſe the plaintiff did not ſhew the name of * him who granted the adminiſtration to the defendant, the Court held that the allegation in the declaration that adminiſtration was committed to the defendant debita juris forma was ſufficient without ſhewing by what ordinary; and judgment for the plaintiff.

14. A *judgment on debt*, given *againſt an adminiſtrator*, was reverſed by error, for that it was *not ſhewed by the plaintiff by whom, nor by what authority the adminiſtration was committed*; for as well as he takes conuzance that he is adminiſtrator, he may take conuzance by whoſe means he is adminiſtrator, for otherwiſe he may charge him as executor of his own wrong. Cro. J. 10. pl. 13. Paſch. 1 Jac. B. R. Wade v. Atkinſon.

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Palm. 97. Chiverſon v. Trudgeon. S. C. adjudged accordingly.— 2 Mod. 65. Hill. 27 & 28 Car. 2. C. B. S. P. adjudged accordingly per tot. Cur. that the adminiſtration being granted by the biſhop's official, the declaration need not ſay loci illius ordinarius, but otherwiſe in the caſe of a peculiar.

15. As to making *profert of the letters of, &c.* not granted by the metropolitan or biſhop, but which are granted by the *archdeacon* or in *peculiars*, thoſe granted in peculiars muſt ſet forth that the grantor is *loci illius ordinarius*, for it cannot be intended that they have any authority unleſs it be ſhewn; but it is otherwiſe of thoſe granted by the archdeacon, for he is oculus epiſcopi, & de jure ordinario he is to commit adminiſtration. Cro. J. 556. pl. 20. Mich. 17 Jac. B. R. Chiberton v. Trudgeon.

16. *In a declaration it is not neceſſary to ſhew by whom letters of adminiſtration are granted, or* to ſay *that they were granted to him by cui pertinuit or per loci illius ordinarium; but in a plea in bar it is otherwiſe*, for this is not the cauſe of the action and effect of the ſuit, but to ſhew they have been in the ſpiritual court; ſic dictum fuit. Sty. 282. Trin. 1651. B. R. in caſe of Marſhal v. Ledſham.

17. If an *adminiſtrator bring an action againſt an adminiſtrator it is not neceſſary for the plaintiff to ſhew by whom the letters of adminiſtration were granted unto the defendant; but he muſt ſhew by whom the letters were granted to himſelf* to entitle himſelf to the action, for if it appear not to the Court that he is adminiſtrator, he cannot ſue by that name; per Glyn Ch. J. Sty. 463, 464. Mich. 1655. in caſe of Ingram v. Fawſet.

12 Mod. 443. S. C. the Court held that the

18. In a declaration by adminiſtrator, *want of alleging by whom adminiſtration was committed is cured by pleading non eſt factum*, (which admits the plaintiff to be a good adminiſtrator), *and by a verdict*

*verdict* by the 16 & 17 Car. 2. cap. 8. 1 Salk. 37. pl. 5. Hill. 12 W. 3. B. R. Gidley v. Williams. defendant by pleading in chief had cured all the faults in the declaration, and judgment for the plaintiff, which was affirmed on writ of error; and without doubt if it had not been aided by the plea, yet it would have been well by the ſtatute of 16 & 17 Car. 2. ——Ld. Raym. Rep. 634. S. C. and judgment for the plaintiff, but per tot. Cur. the want of ſhewing that the adminiſtration was granted would have been ill on demurrer.

19. *In a ſci. fac. by adminiſtrator, he muſt produce his letters of adminiſtration as well in this court as in C. B.* and *though the adminiſtration be committed by the ordinary, yet when there is an appeal from the delegates, the entry is always that it is committed per Dom. Reg.* &c. 2 Keb. 47. pl. 104. Paſch. 18 Car. 2. B. R. Holt v. Lenthall.

20. An adminiſtrator declared on an adminiſtration *committed to him by R. B. archdeacon of Norfolk*, and did *not ſay loci iſtius ordinarium, nor cui de jure pertinet* to grant it, and held good, as well as in the caſe of a biſhop. For the archdeacon is oculus epiſcopi. And per Twiſden a declaration is good without ſaying loci illius ordinarium, becauſe he produces the letters of adminiſtration, but otherwiſe in a bar. Lev. 193. Mich. 18 Car. 2. B. R. Dring v. Reſpaſs. Sid 302. pl. 8. S. C. & S. P. held accordingly, per Cur. —S. P. by Bacon J. For the law takes notice of an archdeacon being a publick ordinary. Sty. 54. Mich. 23 Car. B. R. in caſe of Burnet v. Bird.

21. An *adminiſtrator brought a bill to diſcover and have an account of the inteſtate's eſtate;* the defendant *pleaded that the ſuppoſed inteſtate made a nuncupative will, and another perſon executor*, whom he named in his plea, to whom only he was accountable, and not to the plaintiff or any other, but decreed, that though there was ſuch a *nuncupative will*, yet it was *not pleadable againſt an adminiſtrator before it was proved*, and ſo the plea was over-ruled. Chan. Caſes, 192. Hill. 22 & 23 Car. 2. Verhorn v. Brewin. [328]

22. In debt by an adminiſtrator he *declared on an adminiſtration granted per Carolum Regem*, &c. *without ſaying debito modo*, &c. adjudged good; becauſe the king has univerſal juriſdiction here. Allen, 53. Paſch. 24 Car. B. R. Hobſon v. Wills. Sid. 302. in pl. 8. S. P. cited per Cur. to have been held accordingly.

23. The defendant ſet forth, that adminiſtration was granted to her *by the commiſſary of the biſhop of Litchfield, legitime conſtitutum*, and held good; for in ſuch caſe it is the ſame thing as if granted by the biſhop himſelf. And *the difference is between a peculiar juriſdiction and the authority of the chancellor or commiſſary of the biſhop.* Lutw. 9. Mich. 36 Car. 2. Walford v. Smith.

24. In *covenant* brought *by a leſſor againſt the adminiſtrator of leſſee*, exception was taken to the *declaration*, becauſe it *did not allege by whom the letters of adminiſtration were granted to the defendant, and what authority the grantor had.* Sed non allocatur; for the plaintiff who is a ſtranger need not ſhew it, though an adminiſtrator who is a plaintiff ought to ſhew it. Lutw. 297. 301. Hill. 1 & 2 Jac. 2. Knight v. Greenes.

25. An adminiſtrator declared on an adminiſtration de bonis non *granted to him by the ſteward of the manor of Mansfield*, &c. *cui commiſſio adminiſtrationis illius de jure pertinuit*, and concludes with a pro-

a profert hic in curia, and this was held good. Lutw. 406. 408. Hill. 1 & 2 Jac. 2. Burbridge v. Clayton.

26. The *plaintiff entitles himself as adminiſtrator*, the defendant *pleads the plaintiff is not adminiſtrator*; it was objected this is a negative plea. Per Cur. allow the plea; it is a *good plea in abatement* at law. Vern. 473. Mich. 1687. Winn v. Fletcher.

27. An action againſt an adminiſtrator, and *not ſhewn* in the declaration *that letters of adminiſtration were committed* to him; and this was held by the Court incurable. For though they need not ſhew by what authority they were committed, yet it is neceſſary to ſet forth that adminiſtration was committed to charge him with the action. Otherwiſe of an executor; it is not neceſſary to *ſhew he proved the will*, becauſe an action lies againſt him before probate. 2 Vent. 84. Mich. 1 W. & M. in C. B. Bracton v. Liſter.

Show. 355. S. C. and judgment affirmed for the plaintiff. —4 Mod. 133. S. C. it is cured by the verdict ſince the ſtatute 17 Car. 2. and it was held before that ſtatute that in an action by an adminiſtrator omitting profert hic in curia literas adminiſtrationis was good after a verdict, and ſo judgment was affirmed.

28. Adminiſtrator brought *debt for rent due in the life of the inteſtate*, and *ſhewed that adminiſtration was granted to him by the official of the prebendary of Brampton et peculiaris juriſdictionis*. After verdict it was moved, that it being a peculiar, the plaintiff ought to have ſhewn by what authority; to which it was anſwered that it is *ill on demurrer, but it is now aided by verdict*. Adjudged for the plaintiff by three judges, Holt dubitante. Comb. 196. Trin. 4 W. & M. in B. R. Maſon v. Hanſon.

29. *Trover* was brought by *an adminiſtrator*, and upon not guilty pleaded, verdict was for the plaintiff; and it was moved in arreſt of judgment, becauſe *letters of adminiſtration* were *not ſhewn* to be granted by the ordinary or his official, or other perſon having authority from him, but only per A. B. doctorem per epiſcopum Ciceſtrenſem legitime conſtitutum, i.e. the biſhop had made him a
[ 329 ] doctor, but he does not ſay that he was official, or any other officer of the biſhop, as archdeacon, &c. non allocatur; for though he had not ſhewn any adminiſtration at all, yet it is good after a verdict as it is ruled, Sty. 262. and it was adjudged for the plaintiff. Skin. 551. Mich. 6 W. & M. in B. R. Cheeſeborough v. Linton.

Comyns's Rep. 17. pl. 9. Truelock's caſe. S. C. and held good inaſmuch as the plaintiff ſet forth that adminiſtration was granted by the official of the dean, to whom of right granting adminiſtration, &c. belonged.

30. Debt on a bond as adminiſtrator; the plaintiff in his count ſays that adminiſtration was *committed to him per J. S. official' decani Sarum loci illius ordinar' legitime conſtitut' cui adminiſtratio de jure pertinuit, without ſaying ad tunc pertinuit*; he does not ſay how conſtitut', and held good notwithſtanding. 12 Mod. 100. Mich. 8 W. 3. Truelock v. Hartfield.

31. *Want of ſhewing by whom adminiſtration was committed is naught upon demurrer*; for it might be a peculiar, and then it muſt be averred, cui adminiſtrationis commiſſio de jure pertinuit. And there is good reaſon why it ſhould be ſet forth by whom adminiſtration was committed; for the defendant may conteſt the right

of the perſon granting, and may plead that adminiſtration was granted to another, or that there were bona notabilia. 1 Salk. 38. pl. 5. Hill. 12 W. 3. B. R. the firſt reſolution in caſe of Gidley v. Williams.

32. *Debt by adminiſtrator cui adminiſtratio debito modo commiſſa fuit;* defendant pleads over; per Cur. *this had been bad if demurred unto,* but it is now helped by your pleading over, for you thereby admit he has a right of ſuit, and is adminiſtrator. 12 Mod. 537. Trin. 13 W. 3. Hall v. Bond.

33. *Trover by an adminiſtrator upon a poſſeſſion and loſs by the inteſtate,* the *defendant cannot give in evidence, that there is an executor* 2 Ld. Raym. Rep. 824. Mich. 1 Ann. Marſfield v. Marſh.

34. Plaintiff declared upon an adminiſtration *granted* to him *by the official of a peculiar,* and that *debito modo* commiſſa fuit. Holt Ch. J. Gould and Powis held the declaration good, and that the debito modo was a ſufficient averment; and Holt Ch. J. ſaid that there was no peculiar but had the power of granting adminiſtration, and that this was a needleſs exactneſs, not ſo much regarded lately as it had been formerly, when it was thought not enough even to ſhew an adminiſtration committed by a biſhop, without averring that there were nulla bona notabilia; and judgment for the plaintiff, Powell J. diſſentiente; and afterwards affirmed in Cam. Scacc. per tot. Cur. 1 Salk. 40. pl. 10. Trin. 3 Ann. B. R. and 4 Ann. in Cam. Scacc. Denham v. Stephenſon.

35. Where one grants adminiſtration *virtute officii* the plaintiff need not aver his authority; but otherwiſe it is where it is *by ſpecial commiſſion.* 1 Salk. 41. in S. C.

36. In action againſt adminiſtrator it was not ſaid cui adminiſtratio commiſſa fuit, whereupon was a ſpecial demurrer, and to prove it neceſſary the caſe of Wade and Atkinſon, 2 Cro. was cited. Likewiſe an opinion to this purpoſe, in 1 Syd. 228. and a caſe in 2 Vent. 84. where this was directly adjudged. But the Court ſaid, that *the declaration, charging the defendant as adminiſtrator, is the very ſame in common ſenſe, as if it had ſaid, cui adminiſtratio,* &c. They ſaid too, that one part of the caſe in 2 Cro. had been over-ruled ſeveral times; and therefore this part of it was of leſs authority. It is true, they ſaid there was ſuch an opinion in Syd. And as to the caſe in Ven. the counſel gave an anſwer to that; for they ſaid, that that was a caſe in the Common Pleas, and there the declaration is, that the plaintiff queritur, quod, &c. ſuch a one died inteſtate, and in ſuch caſe, therefore, [ 330 ] you muſt aver, that adminiſtration was committed to the defendant to entitle you to your action; but in our caſe it is queritur de the defendant adminiſtrator, and that is certainly good. Accordingly the Court gave judgment for the plaintiff. Barnard. Rep. 29, 30. Mich. 1 Geo. 2. in B. R. Holiday v. Fletcher.

## (Z. a. 6) Pleadings in Actions againſt Executor or Adminiſtrator.

1. DEBT is brought *againſt two as executors.* It is a good *plea to the writ that they are executors, and not adminiſtrators.* Br. Executors, pl. 39. cites 50 E. 3. 9.

Br. Double, pl. 69. cites 6 E. 4. 12. 14. S. C.

2. Where *writ* is brought *againſt two* as executors, *where the one is not executor*, and he confeſſes the action, and the other pleads non eſt factum, *the true executor ſhall ſay, that he who confeſſed was never executor;* per Littleton; but Chocke contra. But if the deceaſed's goods are put in execution, the *true executor ſhall have* writ of *treſpaſs.* Br. Executor, pl. 88. cites 9 E. 4. 14.

3. Where the *teſtator pleads in bar, and dies*, and *reſummons is brought againſt the executors* of the defendant, *they cannot plead to the writ, unleſs it be matter coming of younger time*, as a releaſe, &c. becauſe their teſtator has affirmed the writ before; quod nota. Br. Executor, pl. 82. cites 24 E. 3. 25, 26. 47, 48.

4. *Recordare* by R. executor of the teſtament of J. B. againſt C. *de equo ſuo capto*, and did not ſay, equo teſtatoris, and yet well; and to ſee that executors ſhall call the *goods of their teſtator, which they had once in their poſſeſſion*, bona *ſua*. Br. Executors, pl. 84. cites 24 E. 3. 35.

5. *Waſte* againſt an executor, and did not count of whoſe leaſe the executor held, and yet well; for he repreſents the eſtate of the teſtator. Br. Executors, pl. 140. cites 38 E. 3. 18.

6. *And* becauſe the writ was *againſt J. as executor of the leſſee*, where he was *executor of the executor* of the teſtator, the writ was abated upon exception thereof. Ibid.

7. In *debt adminiſtrator ſhall be ſued by the name of adminiſtrator*, and *not by name of executor*, and adminiſtrator ſhall have action, &c. and the *defendant pleaded to the writ, that the adminiſtration was bailed to him by one K.* and the *other ſaid that K. did not adminiſter but as ſervant to the defendant;* but the *iſſue was, whether the adminiſtration was bailed to them or not;* for if it was to both, then the adminiſtration ſhall be ſaid by virtue of the commiſſion, and not as ſervant of the other. Br. Adminiſtrator, pl. 23. cites 38 E. 3. 20, 21.

8. *Debt by adminiſtrator*, and *ſhewed the letters of adminiſtration* as he ought, and that they were *committed by the commiſſary of the biſhop;* and exception was taken, becauſe it was not committed by the biſhop himſelf, who is immediate officer to the court; & non allocatur; but the commiſſion awarded good; contra of certification of baſtardy, or of excommunication, for this ought to be by the biſhop himſelf; note a diverſity. Br. Adminiſtrator, pl. 18. cites 1 H. 4. 64.

9. *Debt againſt two* executors, the *one came at the pluries capias, and pleaded plene adminiſtravit at W. priſt;* and the other e contra; and *after came the other by exigent and pleaded to the writ, becauſe three others were executors with them who have adminiſtered, and are*

*not*

*not named*; judgment of the writ; and the *plaintiff replied that the two are ſole executors*, and the defendant pleaded this matter in arreſt of the firſt inqueſt upon the firſt iſſue, for by the replication to the ſecond plea, he has waived the advantage of the firſt plea, where this was ſufficient for all by reaſon of the ſtatute, which wills that he who firſt comes by diſtreſs ſhall anſwer; per Hank. and the opinion of the Court. Br. Executor, pl. 46. cites 7 H. 4. 12.

10. *Debt againſt executors upon deed of their teſtator*, who *pleaded quod non admin' ut execut' aliqua bona quæ fuerunt teſtatoris tempore mortis ſuæ*, and *found againſt them*; and by the opinion of the Court this is no plea, for it may be that they received debts due to their teſtator after his death, or retook goods which were taken by treſpaſſors before his death, or otherwiſe recovered damages for them, but becauſe it was found againſt them, therefore the verdict has made the plea good; per opinionem. Br. Executor, pl. 50. cites 7 H. 4. 39.

11. *Debt againſt adminiſtrator*, and *did not ſhew that the adminiſtration was committed to him by the ordinary*; judgment; and by the beſt opinion the writ is good; and that if it be otherwiſe, the other may plead it. Br. Adminiſtrator, pl. 19. cites 11 H. 4. 72.

12. There was *no action* againſt adminiſtrator at *common law*, but this is given by the ſtatute; per Hank. Br. Adminiſtrator, pl. 19. cites 11 H. 4. 72.

13. *Debt* by J. *as adminiſtrator of* W. P. *and counted of a duty due to himſelf*, and good, by the beſt opinion. Br. Adminiſtrator, pl. 21. cites 9 H. 5. 5.

14. Treſpaſs *of a houſe broken, and goods carried away*; the *defendant ſaid that the plaintiff's huſband was ſeiſed in fee of the houſe, and poſſeſſed of the goods, and made the defendant his executor*, and died, and the defendant *found the door open, and entered, and took the goods*, and the plaintiff, ſuppoſing that ſhe had been executor, took them, &c. and this was admitted good colour, and the plea was awarded good per Cur. notwithſtanding that the *plaintiff brought the action of her goods, and the defendant juſtified of the goods of the teſtator*, per quod the plaintiff ſaid that the teſtator deviſed them to her, and the defendant delivered them to her after the teſtator's death, and after took them, and the defendant ſaid, proteſtando, that they were not deviſed, and pro placito that he did not deliver them, and ſo to iſſue. Br. Treſpaſs, pl. 9. cites 2 H. 6. 15.

15. *Debt againſt two adminiſtrators, at the diſtringas the one came, and the other not*; and the opinion of the Court was, that he ſhould *anſwer alone*, notwithſtanding that the other did not come; for though the ſtatute ſays, that of executors, he who firſt comes ſhall anſwer, yet adminiſtrators are taken by the equity; quod nota. Br. Adminiſtrator, pl. 4. cites 3 H. 6. 14.

16. *Debt againſt one as executor.* He *ſaid that the deceaſed died inteſtate, and the ordinary committed the adminiſtration to him, and to two others who are alive*, not named; judgment of the writ. Per Newton, you *ſay, that they have adminiſtered.* Markham, I do not

not ſay ſo; and there it was ſaid by two juſtices, and not denied, that if the adminiſtration be committed to any one, yet he ſhall not be charged if he do not adminiſter; and *the other ſaid, that after the death of the teſtator the defendant adminiſtered de ſon tort demeſne, and after he took the adminiſtration upon him, pending this writ;* judgment, &c. Br. Adminiſtrator, pl. 5. cites 20 H. 6.

[ 332 ] 17. But the ſame folio, in another action of debt, Forteſcue ſaid, that where the defendant pleaded, ut ſupra, that he is adminiſtrator, judgment of the writ, he *ſhall ſay abſque hoc that he adminiſtred as executor*, and ſo it ſeems ſupra, that if adminiſtration be committed to one. and he refuſes to adminiſter, he ſhall not be charged by force thereof. Ibid.

18. Debt againſt executor; the defendant ſaid *that the teſtator died outlawed, and ſo he had no goods;* judgment ſi actio et adjornatur, therefore quære, for it ſeems that he is chargeable to the king. Br. Dette, pl. 4. cites 3 H. 6. 17.—But ſee 4 H. 7. 18. that to ſay that the plaintiff is outlawed, is *no plea.*

* S. P. Br. Adminiſtrators, pl. 38. cites S. C.

† S. P. Brook ſays, quære the reaſon, whether becauſe the ſale is void, or if there be any covin in it. Br. Adminiſtrator, pl. 38. cites S. C.

19. In *debt againſt baron and feme executrix*, it is a good plea that the feme has * *fully adminiſtered*, and a good *replication that the feme has aſſets, without mentioning the baron;* and it was ſaid there that if the feme may adminiſter and diſtribute without her baron, and that the † feme ſells the goods and redeems them, they ſhall remain in her hands as aſſets. Br. Baron and Feme, pl. 84. cites 18 H. 6. 4. and Fitzh. Replication, 7. per Newton.

Brownl. 97. cites S. C. and 9 H. 6. 7. accordingly.—— Yelv. 115. Mich. 5 Jac. cites ſame caſe accordingly, in the caſe of Lathbury v. Huntley in B. R. where the caſe was, that L. and his wife adminiſtratrix of W. R. brought debt as adminiſtratrix on an obligation of 40 marks, dated 4 April, 38 Eliz. made by the defendant to the inteſtate; 1ſt, The defendant pleads that R. the inteſtate October 1 Jac. made his will, and made the defendant his executor, and deviſed the obligation and the money therein contained to one H. ſon of the defendant, and died, after whoſe death the defendant takes upon him the burthen of the executorſhip, and adminiſters divers goods of R. and he is ready to aver this; to which plea the plaintiff demurs generally, and adjudged for the plaintiff; for the defendant's plea is not good without a traverſe, that R. died inteſtate; for the action is brought as adminiſtrator, and they count upon a dying inteſtate, and that being the ground of the action ought to be traverſed.

20. Debt againſt executors, who *ſaid that the teſtator died inteſtate at D.* priſt, and no plea without traverſing the plea; per Martin, you ought to ſay that he died inteſtate, *abſque hoc that he made him executor.* Per Strange, no, for it may be that he made him executor, and after revoked the teſtament. Per Martin, then he may *ſay that he made him executor and after revoked the teſtament*, and ſo he did; and there it is agreed that after the making of an executor, the teſtator may diſcharge him again of the executorſhip. Br. Barre, pl. 21. cites 7 H. 6. 13.

21. In *debt againſt executors*, it is a good plea that *after the making of them executors* the *teſtator repealed this teſtament at B.* or diſcharged them, *and* after *died inteſtate at N.* Br. Executors, pl. 126. cites 7 H. 6. 13.

22. *Debt againſt J. adminiſtrator;* Candiſh ſaid, the *adminiſtration was committed to us and to N. P.* by the ordinary *who is alive, not named*, &c. Per Hales, you allege not that he adminiſtered, by which Candiſh ſaid as above, *and that N. adminiſtered to S.* judgment

ment of the writ; per Hales, *he did not adminiſter, priſt;* and the iſſue was received, and not if the adminiſtration was committed to them or not; but per Danby, 35 H. 6. fo. 31. the iſſue ſhall be that the adminiſtration was not committed to him. But note, that it may be committed to him, and yet if he does not adminiſter, he ſhall not be charged; but he himſelf ſhall not ſay that ne unques adminiſtrator ne unques adminiſter as adminiſtrator, and concordat 1 H. 5. Br. Adminiſtrator, pl. 24. cites 8 H. 6. 2.

23. *And* ſee T. 2 H. 5. 8. that in *caſu* ut ſupra *againſt an executor*, who *ſaid that there is another alive who adminiſtered*, the *iſſue was if the one alone was made executor.* Ibid.

24. Debt againſt executor, the defendant *pleaded a gift of the teſtator in his life of all his goods except ſuch and ſuch, by which he took the goods given by reaſon of the gift*, and *to the reſt that he has fully adminiſtered*, Cand. ſaid all amounted to plene adminiſtravit, & non allocatur; but all was entered to inform the lay gents, and yet the taking of them as of his proper goods by the gift is not adminiſtration to charge him. Br. Executors, pl. 162. cites 11 H. 6. 35. [ 333 ]

25. In debt againſt executors it is a good plea *that the teſtator made the defendant and A. his executors, which A. has adminiſtered and is alive; judgment of the writ.* Br. Executors, pl. 78. cites 22 H. 6. 59.

26. Debt againſt executor, who *ſaid that there is another executor alive who adminiſtered at D.* &c. the *plaintiff ſaid that the other named executor did not adminiſter*, priſt; and the other e contra, and ſo ſee that in this caſe the adminiſtration of another executor is to be alleged, and is iſſuable, and was pleaded to the writ. Br. Executor, pl. 166. cites 32 H. 6. 25.

27. *Debt by adminiſtrator*, it is a good *plea that the teſtator made the defendant his executor* and died, *and after the ordinary committed the adminiſtration to the plaintiff, and after* the *defendant proved the teſtament; judgment ſi actio;* for the ordinary may commit the adminiſtration in the mean time; but when the executor has proved the teſtament, the power of the adminiſtrator is determined, unleſs the executor has refuſed before the ordinary before this; per Newton, Littleton, and Danby. But it was doubted if he ought to *traverſe, abſque hoc that the party died inteſtate prout, &c.* or not; and by the beſt opinion he ought to traverſe it. Br. Executor, pl. 111. cites 7 E. 4. 12, 13.

28. In *rationabile parte bonorum* againſt executors, ne unques executor is a good plea. Br. Executor, pl. 135. cites 7 E. 4. 20, 21.

29. *So* to ſay *that he is adminiſtrator and not executor.* Ibid.

30. *Contra in detinue of charters relict' in manibus teſtatoris.* Ibid.

31. In debt againſt executors, it is a good plea *that their teſtator died outlawed, or was the king's villain;* per Littleton, Young, and Pigot. Contra per Jenney, for it is only an argument. Br. Executor, pl. 137. cites 8 E. 4. 6.

32. Debt againſt *executor* who *appeared by attorney and imparled* to another term, *and then ſaid that the adminiſtration was committed* Br. Garrant de Attorney, pl. 18. cites S. C.

*to him by the ordinary, inasmuch as the teſtator died inteſtate; judgment of the writ;* and per tot. Cur. he cannot have this plea contrary to the warrant and imparlance; for *this is a miſnoſmer;* but he *may ſay ne unques executor ne unques adminiſtered as executor,* for *this is bar;* and the effect is that he never adminiſtered as executor, and upon this the iſſue ſhall be taken, and not whether he be executor or not; *by which he ſaid proteſtando that he died inteſtate, and that the adminiſtration was committed to him, & pro placito that never adminiſtered as executor,* and the other contra. Br. Executor, pl. 91. cites 9 E. 4. 40.

32. *Treſpaſs of goods carried away,* the *defendant juſtified as executor of J. N.* and the *plaintiff replied, that the ſame plaintiff was executor to J. N. by a laſt teſtament,* and the *defendant rejoined that this laſt teſtament was repealed in the court of Rome, and ſo the teſtament void;* and per Cur. it is no plea, by which he concluded thus, *and ſo not executor;* quod nota, and there it was agreed that judgment given in the court of Rome is not good in England; quod nota. Br. Executor, pl. 168. cites 2 R. 3. 22.

33. In debt againſt executor it is a good plea to *ſay that he has nothing in his hands but 20l. and J. S. has recovered 20l. againſt him as executor,* &c. Br. Executor, pl. 103. cites 5 H. 7. 27.

[ 334 ] 34. *Of perſonal things* adminiſtrators ſhall have *writ of error upon a judgment given againſt the teſtator,* and *ſcire facias upon it;* and by the ſtatute of 31 E. 3. *cap.* 11. it is *ordained that adminiſtrators ſhall have action, and ſhall anſwer to the action,* ſo that *now adminiſtrators ſhall have action as executors,* & *contra* before *at common law;* for then, as it ſeems, *none might have adminiſtered but the ordinary, who ſhould be impleaded, but ſhould not implead,* nor at this day; contra of adminiſtrator, but the *ordinary might have treſpaſs of goods taken out of his poſſeſſion.* Br. Adminiſtrator, pl. 44. cites F. N. B. 21. (M).

35. A. brought debt on a bond againſt B. who pleads that *after the writ brought by A. and before notice one C. brought action againſt B. as adminiſtratrix of J. S. and that adminiſtration was afterwards granted to B.* who *confeſſed the action,* on which C. had judgment beyond which ſhe has no goods; per Anderſon Ch. J. the plea is no bar; for had ſhe pleaded the adminiſtration committed after, C. could not have judgment; ſo where there are *three executors, and debt is brought againſt two,* they muſt plead that matter in abatement, and in caſes of confeſſion of the actions it muſt be averred to be a true debt. Le. 69. pl. 91. Mich. 29 & 30 Eliz. C. B. Blaunchflower v. Fry.

36. *Debt upon two obligations againſt executors, one* of the defendants *pleaded ne unques executor,* judgment was given for the plaintiff, and error brought and *aſſigned for error, that the plaintiff had ſued one jointly with the executor who was not executor;* this ſhall not abate the writ, for it would be miſchievous when divers are made executors and one refuſeth, if the naming of him ſhould abate the writ. Cro. E. 110. pl. 7. Mich. 30 & 31 Eliz. in Cam. Scacc. Thirkettle v. Reeve.

37. Debt

37. Debt upon a bond againſt the adminiſtrator, who *pleaded* that there is *a cuſtom in London that if a citizen* of London *contracts with another citizen to pay money to him*, and *he who made the contract dies, that his executors or adminiſtrators ſhall be chargeable* with ſuch contract, *as if it had been a debt due on bond, and that he had not aſſets ultra* to pay that debt upon contract; and upon a demurrer this was adjudged a good cuſtom; for the executor in conſcience is bound to pay a debt upon ſimple contract as well as a debt on a bond. Cro. E. 409. pl. 21. Trin. 37 Eliz. C. B. Snelling v. Norton.

Noy, 52. S. C. and the plea held good; for debt againſt an adminiſtrator is not firſt given by 31 E. 3. but that was at the common law, and the ſtatute is declaratory. ——— 5 Rep. 82. b. Snelling's caſe. S. C. reſolved that the cuſtom was good, and that though the plaintiff was a ſtranger and not a citizen, yet this cuſtom was good to bind him.

38. If a *debt of record* be *due to the king*, and a *ſubject creditor ſues execution on a ſtatute*, ſo that the executor has no day in court to plead this debt to the king, in this caſe the executor is *put to an aud. quer.* in which he muſt ſet forth the matter. Went. Off. Ex. 133.

If a ſubject to whom the teſtator was indebted ſues the executor, the executor muſt plead that teſtator dies indebted to the king ſo much more than he left not goods to ſatisfy. Ibid. ——— And muſt plead all the record in certain. Ibid. Marg. cites it ſo held Mich. 33 & 34 Eliz. in Lady Walſingham's caſe. ——— But it is enough to ſay, by a record in the Exchequer. Trin. 39 Eliz. B. R. Ibid.

39. *Scire facias* againſt an adminiſtratrix *upon a judgment* had *againſt the inteſtate*; the defendant *pleaded ſhe had no goods which were the inteſtate's at the time of his death in her hands, to be adminiſtered; nor had any at the time of the writ brought, or at any time after.* Per tot. Cur. this is no plea; for a judgment cannot be anſwered without another judgment, and it may be ſhe had adminiſtered all the goods in * paying debts upon ſpecialties, which is not an adminiſtration to bar the plaintiff. Cro. E. 575. pl. 20. Trin. 39 Eliz. C. B. Ordway v. Godfrey.

S. C. cited All. 48. — 4 Mod. 296. Trin. 6 W. & M. in B. R. Newton v. Richards. S. P. and notwithſtanding the caſe of Ordway v. Godfrey was objected as adjudged, yet the plea was held good eſpecially upon a general demurrer as the principal caſe was; but if the plaintiff had demurred ſpecially and ſhewn it for cauſe it might have been otherwiſe.

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40. In *action* brought *againſt executors* they *pleaded an outlawry of the teſtator not reverſed*; it was holden to be no plea, for the teſtator might have debt due upon a contract, or it might be, he deviſed lands to his executors to be ſold, which are ſold and the money aſſets in their hands, in caſe they are not forfeited by outlawry. Cro. E. 575. pl. 21. Paſch. 39 Eliz. B. R. Wooley v. Bradwell.

Brownl. 55. S. C. adjudged an ill bar. And cites Trin. 40 Eliz. Rot. 507. the like plea pleaded to an executor that brought an action of debt and adjudged no plea. And that Dixon adminiſtrator of Collins exhibited a bill againſt Bawden attorney of C. B. and he pleaded in bar an outlawry againſt an adminiſtrator, and adjudged no plea.

41. If A. brings *debt againſt B. as adminiſtrator to J. S. without ſaying that J. S. died inteſtate*, yet it is good. For it may be that J. S. made a will and teſtament, and yet adminiſtration might be committed to the defendant by refuſal, &c. But *otherwiſe* it is *where the plaintiff is adminiſtrator*; there *ought to ſhew that the party died inteſtate*. Williams ſaid, that he had viewed the very record

of that caſe accordingly. Noy, 137. cites 5 Rep. 31. Mich. 41 & 42 Eliz. B. R. Hargrave's caſe.

42. In an action of *debt* againſt an adminiſtrator he pleads that the *teſtator was indebted to him*, and over and above which ſum he hath not to ſatisfy, &c. Per Cur. that is a good plea, and ſafer than to plead plene adminiſtravit, &c. for by that plea it may be tried. Noy, 106. Anon. cites Trin. 2 Jac. C. B.

Cro. J. 102. pl. 34. Milles v. Sherfield. S. C. adjornatur.

43. In *debt againſt an executor*; he *pleads that his teſtator was obliged to B. in a recognizance of* 300*l. ultra quod* he had not to ſatisfy. The plaintiff demurs, and judgment for the plaintiff, becauſe the defendant had *not averred, that it was pro vero et juſto debito*, upon which iſſue might have been taken, and the executor well knowing upon what defeaſance that was made. And by Coke Ch. J. it was ruled accordingly. Noy, 113. Trin. 2 Jac. C. B. Meller v. Sherfield.

44. Debt againſt an executor who *pleaded the teſtator was indebted to the king for the office of ſheriff-ſhip*; and becauſe it was *not averred it was a true and juſt debt, and not paid*, it was adjudged upon demurrer for the plaintiff. Cro. J. 182. pl. 182. Trin. 5 Jac. B. R. Wodel v. Hungate.

45. In *ſcire facias* on a judgment defendant may plead *generally plene adminiſtravit* before the ſcire facias brought, without ſhewing that he did adminiſter in payment of debts of as high nature, yet that muſt be *proved in evidence*, or elſe the trial will fall out againſt the executor. Went. Off. Ex. 137.

46. A. being *executor adminiſtered, and yet would not prove the will*, whereupon *adminiſtration was granted to B.* and B. being ſued for a debt, pleaded the matter above, and it was held a good plea, and found for him before Doderidge J. at Oxford. Went. Off. Ex. 39. Marg.

9 Rep. 110. a. b. S. P. in Mereil Treſham's caſe. S. C. the 4th reſolution there.

47. In *debt againſt an executor* who *pleaded, that his teſtator was indebted to another upon a ſtatute in ſuch a ſum, beyond which* he had no aſſets; the plaintiff *replied, that the ſtatute was acknowledged by fraud.* Warburton ſaid, that one may plead generally that the ſtatute was acknowledged by fraud, *without ſhewing the ſpecial matter.* Brownl. 51. Trin. 9 Jac. Brokeſby v. Treſham.

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48. A. makes B. his executor and dies; and then B. makes C. his executor and dies; and in action of *debt againſt C. as executor of B. executor of A.* C. pleads that he had *renounced the executorſhip of B.* But per Cur. he ought to be executor to both or to none. For by Hobart quod lex conjunxit nemo ſeparet. Noy, 30. Wolſe v. Hayton.

Cro. J. 549. Mawe v. Cacyffyr, S. C. ſtated accordingly, and judgment for the plaintiff. — Palm. 116. Moule v. Moodie, S. C. but ſtates it as a

48. Debt againſt an executor for *arrears of rent* upon a leaſe made to R. who aſſigned it to his teſtator; the defendant pleaded, that after the death of teſtator he *did not enter on the lands* demiſed, but left the poſſeſſion & nulla proficua inde recepit; and upon a demurrer to this plea it was adjudged not good, becauſe the executor *cannot waive the term*; for where once he agreed to be executor, he agrees to every thing that ſhall be incidental to the executorſhip, otherwiſe there would be an agreement to one thing, and a diſagreement to another thing, which cannot be, therefore

*if*

*if* the *rent* which he is to pay *is more than the yearly value of the land*, he ſhould have *pleaded* this matter *ſpecially*, and might have diſcharged himſelf by ſuch plea. 2 Roll. Rep. 131. Mich. 17 Jac. B. R. Paul v. Moody. leaſe made to the teſtator, and judgment accordingly for the plaintiff.

49. *A. was accountable to J. S. and afterwards J. S. was outlawed in an action perſonal. A. died.* The *queen by her letters patents granted unto B.* omnia bona & catalla, exitus, proficua, forisfactur, & *advantagia quæcunque which came to her*, or accrued by reaſon of *the outlawry* of the ſaid J. S. and now *B. brought* an action of *account againſt the executors of the ſaid A. as executors of their own wrong.* The defendants *plead that they had letters of adminiſtration committed to them* by the ordinary, and demanded judgment of the writ. The plaintiff in maintenance of his writ *replied, that the defendants did adminiſter of their own wrong before that adminiſtration was granted unto them.* Upon which the defendants did demur in law. It was the opinion of ſome of the juſtices, that the wrong is purged by taking of letters of adminiſtration, and now they are to be charged as adminiſtrators only, and not otherwiſe. Le. 197. pl. 250. Hill. 30 Eliz. in the Exchequer. Anon. cites 50 E. 3. 9. 20 H. 6. 1. 3.

50. *Aſſumpſit againſt an adminiſtrator* who *pleaded that* on ſuch a day the *inteſtate entered into bond to T. S. to pay 40l. at Michaelmas next enſuing, and that plene adminiſtravit all the goods* of the ſaid inteſtate *præterquam to ſatisfy that 40l.* and upon a demnrrer the Court held it a good plea; for debts on bonds are to be paid before debts on contracts. Cro. E. 315. pl. 9. Hill. 36 Eliz. B. R. Buckland v. Brooke.

53. *Debt* was brought againſt an executor *upon a bond* of his teſtator. The defendant *pleaded non eſt factum ſuum.* It was inſiſted for the plaintiff that this plea was ill, becauſe the relative *ſuum* muſt refer to the defendant, and not to the teſtator, there being no mention of teſtator in all the bar. But three juſtices held e contra, for it *ſhall be referred to that which it may reaſonably relate to make the plea good;* but Whitlock doubted. Latch. 125. Trin. 1 Car. Baker's caſe.

54. Debt againſt an executor who pleaded plene adminiſtravit. It was held no good *evidence* to prove the defendant had promiſed to pay J. S.'s debt due by the teſtator before this action brought; but otherwiſe if he had given his bond for it; and if an executor renew a *bond* which teſtator had entered into as ſurety only, this is no ſuch adminiſtration as will make this plea good againſt other creditors by ſpecialty. Clayt. 88. pl. 148. July, 16 Car. [ 337 ] before Foſter J. Arluſh v. Colliſon.

55. In debt on bond againſt an executor who pleads plene adminiſtravit, and gave in *evidence bonds cancelled* and taken in, and *acquittances* for money, this was held not good without proof of *real payments* made, or new ſecurity given. Clayt. 112. pl. 193. March, 24 Car. Sot's caſe.

56. Adminiſtrator may have *treſpaſs or trover* for goods taken *before adminiſtration granted* to him, for that *relates* to the death of

the inteſtate, and not to the time of the granting it. Sty. 341. Mich. 1652. Long v. Hebbs.

57. Where the *creditor adminiſters* to the inteſtate debtor, he may retain the goods to ſatisfy his debts, and where the goods *are taken away before adminiſtration* granted to him, ſo that he hath none to retain, in ſuch caſe he may have *treſpaſs, or trover, or debt* againſt the perſon who took them, for the action is not ſuſpended by the adminiſtration. Sty. 384. Trin. 1653. Aſhby v. Child.

58. Debt againſt an *executor* who *imparled, and afterwards pleaded a miſnoſmer* in bar, *viz. that he was adminiſtrator with the will annexed, and not executor*, and therefore ought to be named adminiſtrator; but upon demurrer, judgment was for the plaintiff niſi, &c. for he cannot plead a miſnoſmer after imparlance. Sty. 385. Trin. 1653. B. R. Fiſher v. Jefferies.

59. *Riens enter mains* pleaded by an executor is an affirmative plea in ſubſtance, though it ſounds ſomewhat in the negative, for it is in effect the ſame with plene adminiſtravit, and ſuch plea muſt be averred; per Roll Ch. J. Sty. 405. Hill. 1654. Anon.

60. If an action of *debt* be brought *againſt an executor upon a ſimple contract* of the teſtator, and he appears and *pleads nil debet, and found againſt him*, the plaintiff ſhall have judgment, becauſe he has diſpenſed with his advantage. Freem. Rep. 6, 7. in pl. 5. Mich. 1670.

61. In *aſſumpſit* againſt executor the *defendant pleaded a recognizance not ſatisfied, and alſo a judgment in debt for* 5000*l. upon a goldſmith's note, payable with intereſt on demand, which not being paid till ſuch a time after, and the intereſt amounting to* 1700*l. the judgment againſt him was found for* 7600*l.* [6700*l.*] *and that he had not ultra* 40*l. chargeable to this recognizance and judgment.* Adjudged that this plea was ill, becauſe of pleading a judgment for intereſt, which is a devaſtavit to permit it to run in arrear, and then to ſuffer judgment for it, and it ſhall not be intended that there was a want of aſſets to pay it before the incurring of it by the adminiſtrator, the ſame not being expreſsly pleaded. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

62. Aſſumpſit by the plaintiff as adminiſtrator, but at the end of the declaration the *profert hic in curia literas teſtamentarias was omitted.* There was a frivolous plea, on which the plaintiff demurred, and the defendant joined in demurrer, and inſiſted on this fault; but it was ruled by Hale, cæteris tacentibus, that it is only matter of form, becauſe it was not a fault in the declaration itſelf, but an omiſſion of what ought to be inſerted after the end of the declaration, and therefore on a general demurrer no advantage can be taken of it. It was urged that there are 20 books that prove it to be matter of ſubſtance, which Hale confeſſed, but ſaid that the opinion had been otherwiſe for 10 years paſt, (but the reporter thinks that he intended his own opinion,) and therefore judgment for the plaintiff. 2 Saund. 402. Paſch. 24 Car. 2. Slow v. Wilmott.

63. Sc

63. *Sci. fa. by an adminiſtrator* upon a judgment of 1000l. the defendant *pleaded, that ſuch a day before adminiſtration was granted to the plaintiff it was granted to J. N. who is ſtill alive at B.* and demanded judgment of the writ. The plaintiff *replied that J. N. was dead, and concludes to the country.* The defendant demurred, for that the *plaintiff ſhould have traverſed abſque hoc that he is alive.* This plea was held ill, for though it contradicts the declaration, the one affirming that adminiſtration was granted to him, and the other that it was granted to J. N. yet an apt iſſue is not formed without an affirmative and a negative. Vent. 213. Trin. 24 Car. 2. B. R. Forteſcue v. Holt.

3 Keb. 40. pl. 12. S.C. the Court held that the plaintiff ought to traverſe the firſt adminiſtrator's being alive, but is aided by iſſue that he was alive, et de hoc ponit ſe ſuper patriam & prædict' defendens ſimiliter, and that this was a plea in bar, though pleaded in abatement, but per Cur. though it be an ill plea, yet only a reſpondeas ouſter can be awarded, and not judgment peremptory unleſs on iſſue; and a reſpondeas ouſter was awarded. 3 Keb. 40. pl. 12. S. C.

64. *Aſſumpſit* againſt executor; the defendant *pleads four judgments, and that he had but 5l. aſſets* to ſatisfy thoſe judgments *(each of the judgments being for a greater ſum).* The plaintiff *replies to one of the judgments that it was kept on foot by fraud* and covin, &c. and demands judgment, whether he ought not to have his debt? It was objected, that he ought not to anſwer only to one, but to all; as if a man pleads outlawries in bar, and the plaintiff reverſes one of them, this will not ſerve his turn, but he muſt reverſe them all. Vaughan ſaid the defendant hath four ſtrings to his bow, whereof each of them will ſerve his turn; though you have caſhiered one, yet he has three left; and *the moſt proper replication would have been, that he had aſſets above 5l.* and then if iſſue had been taken, and it had been found for the plaintiff, he ſhould have judgment de bonis teſtatoris, as if iſſue had been taken upon a plene adminiſtravit, and aſſets had been proved. This was referred to Serjeant Turner, who made an end of it. Freem. Rep. 28. pl. 35. Hill. 1671. Chamberlain v. Pickering.

64. An action of *debt* was brought *on a bond againſt the defendant as heir of the obligor*, who *pleaded that his anceſtor died inteſtate, and that adminiſtration, &c. was granted to J. S. who gave the plaintiff another bond in ſatisfaction of the firſt;* adjudged a good plea, becauſe by this bond given by the adminiſtrator, the plaintiff's ſecurity was bettered, and the adminiſtrator is now chargeable de bonis propriis. Mod. 225. pl. 14. Trin. 28 Car. 2. C. B. Blythe v. Hill.

2 Mod. 136. Mich. 28 Car. 2. C. B. Peck v. Hill. S. P. and ſeems to be S. C. ruled accordingly. —Plaintiff brought an action of debt on a bond. The defendant pleaded a concord that he ſhould give the plaintiff a new ſecurity for this debt, and another upon another obligation, and that he being executor of the obligor, and the perſon with whom the concord was made, gave the ſecurity according to the concord by a bill ſealed by himſelf. Adjudged an ill plea, becauſe one bond given in ſatisfaction of another, is not any diſcharge whether given on concord or not, and the concord cannot mend the matter, and yet the new bond here obliges him de bonis propriis, where the firſt bond obliged him only de bonis teſtatoris. 3 Lev. 55. Mich. 33 Car. 2. C. B. Lobley v. Gildard.

65. *Three ſeveral actions* were brought *at one time for* 100*l. each;* he pleaded *riens enter mains ultra* 100*l. to each action*, and ſo upon each action there was judgment againſt him for 100l. and upon a motion for an *injunction* it was denied by Lord North. In caſes proper for law a man may defend himſelf by legal pleadings, and

every executor ought to be careful to cover all his aſſets with a judgment. Vern. 119. pl. 108. Hill. 1682. Anon.

66. Judgment upon a *ſci. fa.* againſt an executor and an inquiry, and returned that he *diverſa bona teſtatoris diſpoſuit elongavit & ad proprium uſum convertit*; he comes in and pleads that he [ 339 ] was never executor, or adminiſtered as executor, and traverſes, *abſque hoc* that he *bona teſtatoris diſpoſuit, &c.* whereupon iſſue joined and found againſt him and judgment, which was held good upon a writ of error, for he having gone off from his plea of *ne unques executor*, and traverſed the converſion, it ſhall be intended a converſion as executor. Skin. 85. pl. 2. Hill. 35 Car. 2. B. R. Bird v. Harriſon.

Raym. 406, 407. Mich. 36 Car. 2. B. R. cites 1 Roll. Rep. 226. Trin. 13 Jac. B. R. and ſays that ſo the law is at this day. ——— 2 Jo. 146. S. C.

67. The *probate of a will* is not traverſable. 2 L. P. R. 587. tit. Traverſe, cites Raym. 406, 407. Chicheſter v. Philips.

And in ſuch caſe after judgment againſt him Chancery will not grant an injunction, for in caſes proper for law a man muſt defend himſelf by legal pleadings, and every executor ought to be careful in the firſt place to cover all his aſſets with a judgment. Vern. 119. pl. 108. Hill. 1682. Anon.

68. An executor has 20*l. aſſets*, and he is ſued by two *obligees* for 20*l.* at the ſame time, and pleads plene adminiſtravit. Both ſhall have judgment for that aſſets; but had he paid it to one on the firſt ſuit, or confeſſed judgment to one, he might plead it to the other; Arg. 2 Show. 503. Mich. 2 Jac. 2. B. R.

69. Debt againſt an executor, who *pleaded that his teſtator entered into a bond in ſuch penalty to T. S.* conditioned to pay ſo much money, which was not yet paid, *beyond which he had not aſſets.* To this plea the plaintiff demurred eſpecially, and ſhewed for cauſe that the defendant *did not aver* (as he ought) *that the bond was entered into* by the teſtator *pro vero et juſto debito.* But the Court held the plea good without ſuch averment, for it ſhall be intended the bond was given for a juſt debt, and the obligation itſelf ſhall be ſufficient to diſcharge the executor though he had not received any money of the teſtator's. Carth. 8. Trin. 3 Jac. 2. Lake v. Raw.

Ibid. Marg. cites Trin. 9 W. 3. contra in the Exchequer chamber, Fyly v. Wharton.

70. Action againſt an *adminiſtrator*, and the plaintiff did not ſet forth that adminiſtration was granted to him; adjudged an incurable fault, for though the plaintiff *need not ſhew by whom* adminiſtration was granted, *yet it is abſolutely neceſſary to ſhew that adminiſtration was granted* to charge him in an action. 2 Vent. 84. Mich. 1 W. & M. in C. B. Bracton v. Liſter.

71. In *proof of* a plene adminiſtravit if the action be *debt on a bond*, and you offer payment of a bond on plene adminiſtravit, proof muſt be made that it was a debt by bond, that it was ſealed and delivered; but to *debt on ſimple contract* you need only prove payment, becauſe if no bond, it is a good adminiſtration in an action; per Holt Ch. J. Show. 81. Mich. 1 W. & M. Sanderſon v. Nicholl.

72. In debt plene adminiſtravit *admits the debt*, but otherwiſe in an action on the caſe in an indebitatus aſſumpſit; for there the

plaintiff muſt *prove* the debt; per Holt Ch. J. Show. 81. Mich. 1 W. & M. Sanderſon v. Nicholl.

73. Action lies for *rent due after aſſignment of the term by the adminiſtrator* in the *detinet*, but not in the *debet*. 2 Vent. 209. Mich. 2 W. & M. in C. B. Coghill v. Freelove. S. P. reſolved accordingly. Sid. 266. Trin. 17 Car 2. B. R. in caſe of Hellier v. Caſbard. ——— Lev. 127. S. C. & S. P. by Keeling, to which Twiſden agreed. ——— 3 Mod. 325. S. C. adjudged accordingly.

74. And as to the caſe of OVERTON v. SYDDALL, which was quoted as reported to the contrary by Croke, it appears by Mo. 352. that Popham and Fenner were againſt Gawdy and Clench, and it appears that the action was brought in the debet and detinet, and by a prebendary upon the leaſe of his predeceſſor, and then an aſſignment will be a bar, which matters indeed do not [ 340 ] appear to be urged in the caſe as cited by Lord Coke, and reported by Cro. El. 355. but they go upon the privity of contract ſaid to be diſſolved by the death of the leſſee. 2 Vent. 209. in caſe of Coghill v. Freelove.

75. And Twiſden, Windham, and Keeling, (Hide Ch. J. being dead,) held that this is not contrary to Overton and Siddall's caſe cited in Walker's caſe, 3 Rep. 34. [24.] and in Poph. for there the action was brought by a *ſucceſſor of a prebend againſt executor of leſſee*, and privity of contract does not go to the ſucceſſor more than to the heir, and the *heir of leſſor* ſhall not maintain debt againſt executor of the leſſee after aſſignment, becauſe *no privity of contract*, but only of eſtate, deſcended to him. Ibid.

76. *Scire facias* was brought againſt *an adminiſtrator upon a judgment againſt an executor*. He pleads *plene adminiſtravit the day of the writ purchaſed*; upon which the plaintiff *demurred*; for in ſuch caſe he ought to plead *riens enter mains at the time of the death of the teſtator*; but if he had joined iſſue this had been a waiver of the advantage of it, and Holt Ch. J. cited the caſe of HARCOURT AND WRENHAM, Moor, 858. and ORDWAY AND GODFREY'S CASE, 3 Cr. 575. and though ſome caſes in Keble and the office of executors were cited, the Court ruled the caſe ut ſupra, and did not regard the caſes in Keble, but demanded other authority, and as to the office of executors, they ſaid, that this was a good book, but they did not agree with it in this point. Skin. 565. pl. 12. Mich. 6 W. & M. in B. R. Newton v. Richardſon. 1 Salk. 296. pl. 5. Newton v. Richards, S. C. The defendant pleaded plene adminiſtravit, and that he had no goods on the day of the bringing the firſt ſci. fa. nor at any time after; and upon a ſpecial demurrer to this plea, for that the defendant did not ſhew how he had adminiſtered, the plaintiff had judgment, becauſe againſt a judgment he ought to ſhew how he adminiſtered; but upon a general demurrer it had been a good plea. ——— 4 Mod. 296. S. C. adjudged. ——— Lord Raym. Rep. 3. Richards v. Newton. S. C. adjudged on a ſpecial demurrer to be a good plea. ——— Comb. 298. S. C. adjudged.

77. Action againſt an executor who *pleads ſeveral judgments*, the *plaintiff may reply to them ſeverally, or generally, that they were kept on foot by fraud*; per Holt Ch. J. adjornatur. Show. 289, 290. Mich. 3 W. & M. Beake v. Kent. 4 Mod. 63. S. C. adjudged accordingly in C. B. affirmed in B. R. ——— Carth. 195. S. C. is that the defendant rejoined generally maintaining her bar, and traverſed that all or any of the judgments were kept on foot by fraud, and therefore the Court held the rejoinder good, and if iſſue had been joined that all were kept on foot by fraud, and it had been found that one of them alone had, this iſſue had been found for the plaintiff, becauſe the plea was falſe in part, and ſo the whole is falſe, therefore this general form of pleading would be no diſadvantage to the plaintiff

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(as is pretended) for he might have taken iſſue that all were continued by fraud, or elſe he might have ſingled out one of the judgments, and taken iſſue upon that alone. The plaintiff ſeeing the opinion of the Court, prayed leave to diſcontinue, which was granted.

78. The plaintiff in Cur. Pal. counted againſt the defendant that he was *indebted to the plaintiff as adminiſtrator to F. B. in* 10*l. pro tant' denar' ſum' ejuſdem quer' as adminiſtrator of F. B.* per ipſum def' ad uſum ipſius quer', as adminiſtrator of F. B. *habit' & recept'*. Upon non aſſumpſit pleaded, a verdict and judgment was pro quer', and a writ of error was brought in B. R. and *error* aſſigned that the *plaint was general, and no mention of F. B.* in the plaint, ſo there is a variance between the plaint and the declaration, and for this error the judgment was reverſed. Skin. 386. Mich. 5 W. & M. in B. R. Neath v. Reeves.

79. Defendant muſt not only *prove* payment without abatement or colluſion, as diſcharge of bonds, but alſo that there was a real debt for which the creditor's oath ſufficeth, or if evidence be given that the teſtator acknowledged ſo much due by bond that may be
[ 341 ] allowed, for that would have been good evidence againſt himſelf. Cumb. 352. per Holt Ch. J. Trin. 7 W. 3. Anon.

80. If an action be brought againſt an adminiſtrator, the plaintiff *need not aver* in his declaration *that adminiſtration was committed* to the defendant, contra 2 Vent. 84. Bracton v. Lister, et nota bene, for per Mather, in an anonymous caſe in C. B. Mich. 98. it was held to be ill upon demurrer, but cured by the defendant's pleading, whereby he admitted himſelf a lawful and rightful adminiſtrator; per Holt Ch. J. Comb. 465. Hill. 10 W. 3. B. R. Sparkes v. Crofts.

81. *Debt for rent* upon a parol leaſe, defendant pleaded ſuch a *debt upon obligation ultra quod* he had no aſſets, for being in *equali gradu* he could *not plead the one againſt the other till judgment or payment* of the money, but otherwiſe if one of them be of *higher nature* than the other, and there is no diverſity between debt in the realty by ſpecialty, and in realty without ſpecialty as to equality of degrees. 12 Mod. 291. Paſch. 11 W. 3. in caſe of Cage v. Acton.

1 Salk. 309. pl. 13. S.C. held accordingly.—— Ld. Raym. Rep. 553. S. C. adjudged accordingly.

82. *Covenant* was brought *againſt the adminiſtrator of an aſſignee of a term for years*, and the declaration againſt him was *as aſſignee of the leſſee*, though he was only the adminiſtrator of the aſſignee, and adjudged that the action was well brought againſt the adminiſtrator by the name of aſſignee. Carth. 519. Paſch. 12 W. 3. B. R. Tilney v. Norris.

83. If executor *ſuffers judgment to go againſt him by default*, it is an *admiſſion of aſſets*, and the ſheriff may on the fi. fa. return a *devaſtavit*. 12 Mod. 411. Trin. 12 W. 3. Rook v. Sheriff of Saliſbury.

84. In an action againſt an executor or adminiſtrator, if he *pleads twenty judgments*, he confeſſes aſſets for above nineteen of them; and yet they muſt at their peril plead all the judgments in force againſt them, for if they fail in one of them, they ſhall never take advantage of it, for the creditor ſhall have judgment

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to execute when aſſets come, and if the executor plead not all his judgments, he loſes the *right of preferring them*, and may be charged in a *devaſtavit* for thoſe judgments he has omitted to plead, of which ſee a caſe well reported in Hutton; for the pleading of the judgment is a protection of the aſſets which you have or may have until the judgment be ſatisfied, and if one pleads five judgments, and one of them be falſe or *fraudulent*, you are ſaddled with the whole debt. Per Holt Ch. J. and Gould J. 12 Mod. 196. Trin. 13 W. 3. Atfield v. Parker.

85. When an executor pleads to a *recognizance*, he *muſt ſet it forth* to the Court, that the Court may ſee whether it be to be performed or not, *but* if it be a *debt*, they only need ſay that a judgment was obtained againſt him in ſuch a court, if it be *in any* of *the courts of Weſtminſter*, *but if* it be *in any inferior court*, they muſt give it juriſdiction, and ſay taliter proceſſum fuit, &c. Here the plaintiff had judgment upon the firſt exception; per Holt Ch. J. 12 Mod. 613. Hill. 13 W. 3. B. R. in caſe of Ingram v. Foot.

86. Adjudged, that *where an executor ſuffers judgment* to go againſt him *by default upon the writ of inquiry*, *he ſhall not give in evidence want of aſſets*, becauſe he is now eſtopped; for he *ought to have pleaded plene adminiſtravit*, *or ſpecially what aſſets he had.* 6 Mod. 308. Mich. 3 Ann. B. R. Treile v. Edwards.

87. *A ſci. fa. quare dampna aſſideri non debent*, was ſued out againſt an *adminiſtratrix* upon the new ſtatute for *preventing of vexatious ſuits*, *&c. upon an interlocutory judgment againſt the inteſtate*, to this ſhe *pleads judgments* recovered againſt her *upon bonds* entered into by the inteſtate, and adjudged no plea, becauſe the act doth not allow the executor or adminiſtrator to ſay any thing in bar of the action, more than the teſtator or inteſtate could [342] have had when living, which was only in arreſt of judgment, but he ſhall not be chargeable with coſts. L. P. R. 43. cites 3 Ann. B. R. Smith's caſe.

88. In debt againſt an executor for rent incurred after his entry, he cannot plead plene adminiſtravit, for that *confeſſes miſapplication*, ſince no other payment out of the profits can be juſtified till the rent be anſwered. 1 Salk. 317. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

89. An executor *cannot plead riens en ſes mains in any caſe but to a ſcire facias upon a judgment*, for he may commit a devaſtavit by a releaſe, though he had never the goods in his hands. Trin. 9 Ann. B. R. Peck v. Peck.

90. Executor *promiſed to pay a debt of teſtator's on a certain future day*, and the action was againſt him as executor; but Parker Ch. J. held that the naming him executor was ſurpluſage, becauſe it appears on the face of the record that the demand was a demand upon him upon his *own contract*. In effect the forbearance is the conſideration of this promiſe, becauſe without *forbearance* no advantage can be taken of this promiſe; cites 1 Salk. 117. Yard v. Ellard, and to this opinion the reſt of the Court inclined. Sed adjornatur. 10 Mod. 254. Trin. 13 Ann. B. R. Johnſon v. Gardiner.

## (Z. a. 7) Replications to Pleas of Judgments, &c. good or not good.

Saund. 338. pl. 58. S. C. & S. P. held that the word placitum is nomen collectivum and refers to all the replications.

1. IN debt upon bond againſt an executor, who *pleaded ſeveral judgments* in bar to the action, *ultra quod he had not aſſets*; the plaintiff *replied*, that (placitum) prædict' eſt minus ſufficiens to bar him, becauſe *ſatisfaction was acknowledged on ſuch an one of the judgments, and that all the other were kept on foot by fraud, and hoc parat' eſt verificare*, but did *not ſay, per recordum*; and upon demurrer to this replication, it was adjudged for the plaintiff, becauſe hoc parat' eſt verificare ſhall be taken reſpectively, and ſhall be good on a general, though otherwiſe on a ſpecial demurrer, and the word placitum is not but one bar, viz. all the judgments make but one bar, and therefore placitum in the replication anſwers the whole. Sid. 429. pl. 16. Mich. 21 Car. 2. B. R. Hancock v. Prowt.

2 Saund. 48. pl. 7. Tretheway v. Ackland. S. C. ruled accordingly, and ſays that it had been ſo ruled ſeveral times before.

2. If an *executor pleads ſeveral judgments*, the plaintiff may *reply diſtinctly to each of them, that they were obtained by fraud*; *or* you may ſay, *ſeparalia judicia, &c. obtent' per fraudem*, but in the laſt pleading *if one is found to be a true debt*, the plaintiff muſt have judgment. Per Twiſden. Mod. 33. pl. 79. Hill. 21 & 22 Car. 2. B. R. Anon.

The reporter ſays, that this is an anomalous caſe, and againſt the rules of the law, which condemns double pleading; but that it has been allowed in this particular caſe ſeveral times, and cites 8 Rep. 132, 133. Turner's caſe, and 9 Rep. 108. Merial Treſham's caſe. —— 2 Keb. 591. pl. 11. Trethuny v. Ackland, S. C. ruled accordingly. ——— In aſſumpſit againſt an executor, who pleaded a recognizance and ſeveral judgments againſt himſelf, and ſeveral obligations, and payment of them all, and that he had fully adminiſtered, &c. The plaintiff may reply to all or to as many of them as he pleaſe; per Curiam. Lev. 281. Hill. 20 & 21 Car. 2. B. R. Jefferies v. Dee.

3. In debt againſt an executor, he *pleaded judgments, and that he had not aſſets ultra*; the plaintiff *replied*, that the judgments were kept on foot by *fraud and covin*. The defendant *rejoined*, *that he did not keep them on foot by fraud*; and exception was taken, [ 343 ] becauſe he did not *ſay, the judgments or any of them*. Vaugh. Ch. J. held the exception good, for the rejoinder is a negative pregnant; and judgment per tot. Cur. for the plaintiff. Cart. 221. Paſch. 23 Car. 2. C. B. Warcupp v. Symonds.

4. Debt againſt an executor upon a bond of his teſtator; the defendant *pleaded two judgments had againſt the teſtator*, and ſet them forth, *and that he had not aſſets ultra* 40 *s.* towards ſatisfaction. The plaintiff *replied, that defendant paid ſo much upon the firſt judgment, and ſo much upon the other, yet kept on foot by fraud*; and upon demurrer it was inſiſted that the replication was ſo complicated, that no diſtinct iſſue could be taken upon it, for the plaintiff put them both together, when he alleges they were kept on foot by fraud; but the replication was held good, and the plaintiff had judgment. 2 Mod. 36. Paſch. 27 Car. 2. C. B. Maſon v. Stratton.

5. *Debt*

5. *Debt on bond* againſt an *executor*, who *pleaded a judgment obtained againſt him upon another bond* of the teſtator, *but did not ſay prout patet per recordum;* then he *pleaded ſeveral other judgments, and that plene adminiſtravit all the goods* of the teſtator *præterquam* 10 *s. which was charged with the ſaid judgments, and not ſufficient to ſatisfy them;* the plaintiff *replied proteſtando, that all the judgments were obtained by fraud, pro placito dicit, that the day of the writ there was no more than* 100*l. due on all the judgments, and that the defendant then had ſufficient aſſets to ſatisfy the judgments, and likewiſe the debt due to the plaintiff, but that he ſuffered the judgments to remain in force to defraud him.* Upon a demurrer, it was reſolved that this general pleading of aſſets to ſatisfy all the judgments, and the plaint was good; but becauſe no *venue was laid where he had aſſets,* ſo that it was not triable, it was an incurable fault. 3 Lev. 311. and 368. Trin. W. & M. in C. B. Knighton v. Moreton. S. C. cited Lutw. 430.

6. *Debt* againſt an adminiſtrator *upon a bill penal of the inteſtate,* &c. the *defendant pleaded in bar ſeveral judgments obtained againſt him as adminiſtrator upon bonds of the inteſtate amounting to* 115*l. and that he had fully adminiſtered præterquam* 10*l. which was not ſufficient to diſcharge the ſaid judgments.* The plaintiff *replied and confeſſed the bonds; but that at the time of the judgments obtained, there was but* 48*l.* 10*s. due on the ſaid bonds,* and ſhews to whom, *and that it was more than was really due for all the debts and damages on the ſaid judgments, and that it would be accepted in full diſcharge thereof, and that the defendant had aſſets ultra* the ſaid 48l. 10s. to ſatisfy the plaintiff's debts; and upon demurrer to this replication it was held ill, becauſe nothing was put in iſſue; for the allegation of 48 l. 10 s. would be accepted in full diſcharge of the judgments is matter which might be given in evidence to prove the fraud; he ſhould have ſaid, that the creditors would have accepted leſs than the debts due to them, and that the defendant would not pay it, but keep the judgments on foot by fraud. Nelſ. Abr. 172. pl. 9. cites 1 Lutw. 445. [Mich. 3 Jac. 2.] Bell v. Bolton.

## (Z. a. 8) Pleadings. Ne unques Executor, Ne unques adminiſtered as Executor, &c. [344]

1. *DEBT againſt an adminiſtrator,* who *ſaid that the writ ought to be* brought againſt them *by the name of executors,* though they are adminiſtrators, judgment of the writ, becauſe the ſtatute gives writ of debt for adminiſtrators, and action of debt was maintainable againſt them at common law, therefore the writ was awarded good; by which the defendant ſaid that he was not adminiſtrator; nota. Br. Adminiſtrator, pl. 10. cites 41 E. 3. 2.

2. In *debt againſt executrix,* if the *defendant ſays, that ſhe is adminiſtratrix,* &c. *and did not adminiſter any goods before the letters of adminiſtration committed to her,* there it ſuffices for *the other to ſay, that ſuch a day and year ſhe adminiſtered certain goods,* &c. without *ſhewing what goods.* Br. Pleadings, pl. 22. cites 19 H. 6. 14.

3. *Contra*

3. *Contra* where ſhe ſays, that ſhe made the *funeral with ſuch goods, and ſhews what, abſque hoc that ſhe adminiſtered other goods before the letters committed to her*, there the *plaintiff ſhall ſay, that ſhe adminiſtered other goods before, and ſhall ſhew what in certain* in this ſpecial caſe; contra in the common caſe as above. Ibid.

4. *Debt againſt two as executors*, who *ſaid, that the ordinary committed to them the adminiſtration, becauſe he died inteſtate*, and ſo they ought to be named adminiſtrators, and not executors, judgment of the writ; the plaintiff ſaid, that the teſtator made them two executors, and died, and they adminiſtered as executors, and pending the writ, the ordinary committed to them the adminiſtration, judgment, &c. and the defendants ſaid that he died inteſtate, and the adminiſtration was committed as above, before the writ brought, abſque hoc that it was committed pending the writ. Br. Traverſe per, &c. pl. 89. cites 21 H. 6. 23.

5. *Debt againſt three executors, two pleaded fully adminiſtered*, and the *third ſaid, that the teſtator died inteſtate at B. and the ordinary, by his commiſſion, ordained the defendant and two others to receive and levy the goods of the deceaſed, and to render account of them to the commiſſary, upon requeſt*; by which the defendant and the two received divers goods, and thereof have *fully accounted before the ſaid commiſſary*, judgment, &c. Per Newton, this is no plea without traverſe, no more than if I ſay, that the teſtator gave to me, by which I took it; this is no plea without traverſe, abſque hoc *that they adminiſtered any goods of the deceaſed as executors of the teſtament in other manner*, and the *other ſaid, that he adminiſtered divers goods and chattels at H. as executor*. Priſt, &c. and the others e contra, and that all was entered for the difficulty of the lay gents, and ſo it was. Br. Traverſe per, &c. pl. 91. cites 21 H. 6. 27, 28.

6. *And* in *debt againſt a feme as executrix, who ſaid, that* the *baron died inteſtate, and ſhe expended certain goods in his ſepulture, abſque hoc* that ſhe adminiſtered as executrix. Br. Ibid. cites 2 H. 6.

7. Debt againſt executor, who *ſaid, that the teſtator died inteſtate, and the ordinary committed the adminiſtration to J. N. who ſold ſuch goods to the defendant, by which he took them, and adminiſtered as his proper goods, abſque hoc that he adminiſtered other goods*; and by ſome this amounts but to the general iſſue, by which he paſſed
[345] over, and *ſaid, that he delivered to him certain goods* and certain apparel, and ſhewed what, *abſque hoc that he was executor, or adminiſtered as executor*, &c. Quære. Br. Dette, pl. 189. cites 32 H. 6. 6.

8. Where the *defendant, in debt againſt him as adminiſtrator, ſays that he buried the inteſtate, or was his feme, and took his neceſſary apparel*, abſque hoc *that he adminiſtered in other manner*, this is a good traverſe. Br. Traverſe per, &c. pl. 141. cites 37 H. 6. 27, 28.

9. *But where ſhe confeſſes no adminiſtration*, there the *traverſe ſhall be abſque hoc that ſhe adminiſtered.* Note the difference. Br. Ibid.

2 Lev. 190. Paſch. 29 Car. 2. B.R. Gran.

10. Debt againſt an executrix, who pleaded ſhe never was executrix, or ever adminiſtered as executrix; the plaintiff *replied, that ſhe had adminiſtered as executrix of the teſtament*, &c. *priſt*. And

*in*

*in evidence the defendant ſhewed letters of adminiſtration granted to her* of the goods of the deceaſed, *by which ſhe adminiſtered them, and that ſhe did not adminiſter before.* This ſeems good evidence; for *ſhe adminiſtered as adminiſtrator by authority*, and not de ſon tort, and yet ſhe might have pleaded this matter in abatement of the writ, in which ſhe was named executrix. Quære. D. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon.

well v. Sibley executor, and after imparlance pleaded that ſhe had adminiſtration granted to her, abſque hoc that ſhe is executrix, or over adminiſtered as executrix. The Court held this to be a plea only in abatement, and therefore not pleadable as here after imparlance, and gave judgment for the plaintiff. ——— 1 Salk. 266. pl. 4. Mich. 5 W. & M. in B. R. the S. C. of D. 305. pl. 61. cited and relied upon, but the Court held it no plea in bar.

11. The defendant made *conuſance ut ballivus adminiſtratoris of the grantee of a rent*, but did *not ſhew the letters of adminiſtration.* The Court agreed that this would have been a good exception, but that it being taken after a demurrer, it was relieved by the ſtatute of 27 Eliz. of demurrers. 4 Le. 116. pl. 214. Trin. 29 Eliz. C. B. in caſe of Ognell v. Underhill.

12. Adminiſtrator durante minore ætate cum teſtamento annexo, plaintiff did *not ſet forth, that adminiſtration was committed to him*, but *profert hic in curia literas teſtamentarias, without ſaying* literas *adminiſtrationis;* this was held ill, and not cured by a verdict. 2 Jo. 193. Paſch. 34 Car. 2. B. R. Lake v. Thacker.

13. *Action* was brought *againſt E. as executor of J. S.* who *pleaded he was not the ſame perſon named in the will* (and *in truth J. S. made others executors, and not E.*); this upon a demurrer was held an ill plea, becauſe *he might be executor de ſon tort, though* he be *not named in the will*, and ſo may be chargeable, and therefore he *ought to have pleaded, that he was not executor, nor ever adminiſtered as executor;* and judgment for the plaintiff. Sty. 63. Mich. 23 Car. B. R. Seaman v. Edwards.

14. If the *defendant pleads that the teſtator made one J. S. executor, who proved the will*, &c. he ought to traverſe abſque hoc that he was executor, or ever adminiſtered as ſuch, for both may be true, and yet the defendant liable as executor de ſon tort. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. B. Singleton v. Bawtree.

## (Z. a. 9) Pleadings in Actions by or againſt Executors, &c. Where there muſt be Monſtrans of the Teſtament, or Letters of Adminiſtration.

1. IN *raviſhment of ward by three executors*, the defendant demanded oyer of the teſtament, & non allocatur; but he demanded oyer of the writ, and it was granted. Br. Monſtrans, pl. 29. cites 7 H. 4. 2. [ 346 ]

2. It is ſaid that an executor who brings an action ſhall ſhew the *teſtament*, and *teſtament nuncupative* under the ſeal of the ordinary *is ſufficient;* quod nota bene. Br. Monſtrans, pl. 140. cites 14 H. 6. 5.

As to the ſuing of actions, the judges will not admit the executors to ſue for things in action unleſs they ſhew the teſtament duly proved under the ſeal of the ordinary, but if proved by ſome of them, the king's courts will allow it. 9 Rep. 38, a. in Henſloe's caſe.

3. Debt

3. Debt by executor; the *defendant imparled;* he ſhall not have *oyer of the teſtament* after this by award. Br. Oyer de Records, pl. 39. cites 19 H. 6. 7.

4. *And* after imparlance the defendant ſhall not have oyer of the teſtament, nor of the obligation and condition, and yet he may plead variance between the writ and the obligation after imparlance, for the obligation remains always in court; contra of the teſtament. Br. Ibid. cites 38 H. 6. 2.

Wherefore the plaintiff ſaid that the adminiſtration was committed to him pending the writ, where he was made executor and adminiſtered as executor before, and the defendant ſaid, that the adminiſtration was committed ut ſupra, abſque hoc that it was committed pending the writ, and the other e contra. Br. Ibid.

4. Debt againſt an executor, who *ſaid, that the dean of Paul's in London has juriſdiction ordinary in K.* and ſhewed by ſpecialty, pleading, how, &c. *and that the party died there, and* that *the dean committed the adminiſtration to the defendant, becauſe the party died inteſtate,* and ſo *ought he to be named adminiſtrator,* and not executor; judgment of the writ; Yelverton prayed oyer of the letters of adminiſtration. Portington ſaid, you ſhall not have it; for where an executor brings an action, he ought to ſhew the teſtament. Br. Monſtrans, pl. 55. cites 21 H. 6. 23.

5. *But* if an *action* be brought *againſt two executors,* and they *ſay, that the teſtator made them and J. N. executors, who adminiſtered* with them, *and is alive,* not named, &c. judgment of the writ, there they need not ſhew the teſtament; and ſo note a *diverſity* where they *bring the action,* and where the action is *brought againſt them;* and the beſt opinion was, that in the caſe above, the defendant need not ſhew the letters of adminiſtration. Ibid.

The defendant need not ſhew the letters of adminiſtration by way of defence. Contra where it is by way of action. Br. Adminiſtrators, pl. 34. cites Hill. 21 H. 6. 23. and Paſch. 10 E. 4. 1.

6. Teſtament and obligation ſhall be ſhewn *without demand of the other party,* but in formedon in remainder the demandant is not bound to ſhew it, unleſs the tenant demands it; quod nota diverſity. Br. Count, pl. 53. cites 36 H. 6. 16.

8. *Treſpaſs of chattels taken;* the defendant *juſtified as adminiſtrator* of the goods of J. N. to whom the goods belonged, and was not compelled to ſhew the letters of adminiſtration, becauſe it was a *thing veſted in poſſeſſion and by way of bar; but if* it was *by way of demand,* he and executor ſhall ſhew the letters of adminiſtration and teſtament; *but he who claims a rent-charge or reverſion,* ſhall ſhew deed, though it be by bar, for he is *intitled to the thing by the deed, but letters of adminiſtration intitles him to the action* only, *and not to the thing.* Br. Monſtrans, pl. 118. cites 10 E. 4. 1.

9. *Treſpaſs* by an executor *of goods carried away in the life of the teſtator,* the plaintiff ſhall not be compelled to *ſhew teſtament in another term,* by the opinion of the Court; and therefore, if the defendant does not demand oyer of it the firſt term, he has ſurceaſed his time; *contra of letters of adminiſtration;* for there the [347] form is quod profert literas ſuas adminiſtrationis, and therefore there exception may be taken at any time. But ſee the Old Book of Entries, that he ought to ſhew the teſtament alſo, et profert literas teſtamentar', &c. nevertheleſs it appears there, that notwithſtanding this, the defendant ſhall not have oyer of it in another term. Br. Monſtrans, pl. 143. cites 16 E. 4. 8.

10. Treſpaſs

10. Treſpaſs in an *action* brought by adminiſtrator, he ought to ſhew the *letters of adminiſtration*. Br. Monſtrans, pl. 125. cites 21 E. 4. 50.

11. *So* where he *juſtifies as* adminiſtrator; per Brian. Br. Monſtrans, pl. 125. cites 21 E. 4. 50.

12. Treſpaſs by A. *adminiſtrator* of the goods, &c. of J. N. and counted of *goods taken out of his proper poſſeſſion*, and yet did not ſhew the letters of adminiſtration, notwithſtanding that he named himſelf adminiſtrator, by reaſon that it is of his own poſſeſſion. Br. Monſtrans, pl. 128. cites 22 E. 4. 11, 12.

So of an executor. Ibid. pl. 115. cites 6 E. 4. 1.—But in an action of the poſſeſſion of the teſtator he ſhall ſhew teſtament; note a diverſity. Ibid.

13. *So* if executor brings ſuch an action, &c. and *counts of a duty to himſelf, or* of a *bailment made by himſelf*. Br. Monſtrans, pl. 128. cites 22 E. 4. 11, 12.

14. In *treſpaſs* the plaintiff intitled himſelf by leaſe for years of a ſtranger. The defendant ſaid, that before this the leſſor *leaſed to W. N. for years, which term yet continues, and W. N. made the plaintiff his executor*, and died, and he entered as executor, and a good plea without ſhewing the *teſtament*, for it *ſhall not be ſhewn* to the court, *but to enable the plaintiff to the action*, and now the *defendant has admitted it*; quod nota by award. Br. Monſtrans, pl. 167. cites 1 H. 7. 18.

15. He who claims by deviſe need not ſhew *teſtament*; per Fineux Ch. J. Br. Monſtrans, pl. 172. cites 13 H. 7. 14. and 20 H. 7. 6.

16. *Aſſumpſit by executor of a promiſe to his teſtator* found for the plaintiff, and judgment; error was aſſigned, becauſe he did *not ſhew in court the teſtament in the declaration mentioned*. It was holden per tot. Cur. to be matter of ſubſtance; for otherwiſe he does not intitle himſelf to the action, and the judgment was reverſed. Cro. E. 551. pl. 1. Paſch. 39 Eliz. B. R. Edwards v. Stapleton.

Noy, 63. S. C. and judgment reverſed.—3 Bulſt. 223. S. C. cited accordingly.

16. In *ſcire facias on judgment had by the teſtator*, he need not ſay in the writ, profert literas teſtamentarias; and Raymond having, for want thereof, demurred, it was over-ruled per Cur. on reading the record. Keb. 894. pl. 59. Paſch. 17 Car. 2. B. R. Whitmore v. Jaacob.

Sid. 249. pl. 16. Whiteman v. Miles, S. C. the Court held it only matter of form, and ſo it had been adjudged, and then defendant ſhall not have advantage of it on ſuch general demurrer; and judgment for the plaintiff.——But if judgment had been had by executor or adminiſtrator it ſeems clear that in ſci. fa. thereupon it is not requiſite to ſay profert in cur. lite.as, &c. becauſe it appears by the judgment. Ibid. by the reporter.

17. In a *ſci. fa. by an adminiſtrator, on a judgment recovered by the inteſtate or by himſelf*, he need not ſay, profert literas adminiſtrationis; for a ſci. fa. is no declaration. 2 Keb. 882. pl. 62. Hill. 23 & 24 Car. 2. B. R. Remington v. Holt.

18. When the defendant pleads *letters of adminiſtration*, he need not ſay, hic in curia prolat'. But the plaintiff that intitles himſelf to the action muſt; per Vaughan. Cart. 227. Trin. 23 Car. 2. C. B. Mellor v. Overton.

Where an adminiſtrator brings a ſcire facias, on a judgment recovered by himſelf, he need not come with a profert hic in curia lit' teſtam', but where he brings it

on a judgment recovered by his teſtater, he muſt. 2 Show. 459. pl. 425. Hill. 1 & 2 Jac. 2. B. R. Vallet v. French.

19. If an *executor brings an action as executor, where he need not name himſelf executor*, he need not plead with a profert in curia of the letters teſtamentary. 2 Ld. Raym. Rep. 1215. Mich. 4 Ann. in caſe of Wallis v. Lewis.

20. An *adminiſtrator* brought an action, and *did not ſet forth the letters of adminiſtration*; yet the *defendant* having *pleaded non eſt factum inteſtati*, that *made the declaration good*. 8 Mod. 356. cites Hill. 11 Geo. in the caſe of Hedley v. Williams.

## (Z. a. 10) Pleadings. What ſhall be ſaid to be an Admiſſion of Aſſets.

Ld. Raym. Rep. 589. S. C. and verdict given for the plaintiff at the aſſiſes was ſet aſide, and a rule of Court made that the defendant ſhould have his coſts.—Comyns's Rep. 87. pl. 57. S. C. the Court held that the action did not lie againſt the ſheriff; for he had done his duty;

1. A. Brought *action againſt an adminiſtrator*, who, pending that ſuit, *let judgment be had againſt him by B. and did not plead that judgment in bar to the firſt action, but ſold the goods of the inteſtate to pay B. A. likewiſe got judgment, and brought a fieri facias*, on which the *ſheriff levied part, and as to the reſt returned a devaſtavit*. In an action brought againſt the ſheriff for a falſe return, it was inſiſted for the plaintiff, that the ſuffering judgment by default was no confeſſion of aſſets, and that the ſheriff ought not to have returned a devaſtavit, but a nulla bona, and upon that there ought to have been a ſcire fieri inquiry; but adjudged, that he may return a devaſtavit on the firſt fieri facias, if he will run the riſque of its being true or not, and that the inquiry is only for his ſafety, that if an *executor ſuffers judgment to go by default, or confeſſes it, he admits aſſets*; that he might have pleaded the firſt judgment obtained by B. againſt the action of A. & riens ultra; but not having done it, it is an admiſſion of aſſets, to anſwer the judgment in this as well as to the firſt action, and he is eſtopped to ſay the contrary upon a devaſtavit returned. 1 Salk. 310. pl. 14. Mich. 12 W. 3. B. R. Rock v. Leighton.

for when a judgment is given againſt an executor or adminiſtrator, it is given of all aſſets which he had at the time of the commencement of the action, and if an executor or adminiſtrator hath paid off a judgment pendente lite, it cannot be given in evidence upon plene adminiſtravit pleaded; for it ought to be pleaded ſpecially.

12 Mod. 527. S. C. & S. P. accordingly per Holt Ch. J.—If he pleads ſeveral judgments it is a confeſſion of aſſets to ſatisfy all,

2. If there are *three judgments againſt the teſtator, each* one for 20*l.* and the *executor has aſſets but to the value of* 20*l.* if he *pleads theſe three judgments*, and one of them is ill pleaded, or, upon iſſue joined, *one of them is found againſt the executor*, (though in fact, perhaps, he has but 20l. which will not be ſufficient to ſatisfy the other two judgments of 20 l.) yet, by pleading the three, it is an implicit confeſſion of aſſets for more than the two judgments, and therefore in ſuch caſes judgment ſhall be againſt him for the value of the ſaid judgments; per Holt Ch. J. which Gold J. agreed.

Ld. Raym. Rep. 678, 679. Trin. 13 W. 3. in caſe of Parker v. Atfield. and the rens ultra a certain third reſolution in the caſe of Parker v. Atfield.

ſum is only form, and not traverſable. 1 Salk. 311. pl. 16. Trin. 13 W. 3. B. R.

## (Z. a. 11) What Plaintiff muſt do on Plene Adminiſtravit pleaded. [ 349 ]

1. IN debt againſt executors or adminiſtrators, plene adminiſtravit is *no plea, unleſs he ſays the day of the writ purchaſed*, quod nota. Br. Aſſets, pl. 7. cites 5 H. 5. 10, 11. Debt againſt an executor who pleaded plene adminiſtravit,

the plaintiff replied aſſets die exhibitionis billæ, viz. 23d of October, which is the firſt day of Michaelmas term; now it appears upon the evidence, that the bill was not filed till after fourteen days or after in that term, nothing which he had in his hands which he had paid within that term to diſcharge other debts of equal nature, before the very day of filing the bill, ſhall be aſſets. Sid. 432. Mich. 21 Car. 2. B. R. Man v. Adams.

2. *Debt againſt three executors of an executor, one pleads a releaſe to his teſtator at L.* the *other pleads that firſt teſtator made their teſtator, and one B. his executors who is yet living, and not named* in the writ, and prays *judic' de breve;* the *third pleads plene adminiſtravit in the county of W.* and ſo to iſſue upon all. Here all the pleas go to the action, and therefore it was ſaid that the plaintiff at his election might try which he would firſt, for if any one were found with him he ſhall recover de bonis teſtatoris. But the releaſe being a perpetual bar between the parties, and to avoid entanglement, if any of the other iſſues were tried firſt, a niſi prius ſhall iſſue to L. to try the ſaid releaſe at the prayer of the defendant. But if one had pleaded in abatement of the writ, the other to the action, the plea in abatement ſhould be firſt tried, for the plaintiff ought not to recover upon a bad writ. 8 E. 4. 24. a. pl. 3. Fitzh. tit. Executors, pl. 31. cites S. C.

3. *Executor adminiſters, and afterwards refuſes in court, and adminiſtration is granted to J. S.* In debt brought againſt the *executor* he *pleaded plene adminiſtravit, and gave in evidence that he himſelf had paid certain debts, and that all the reſidue of the aſſets were recovered by creditors againſt the ſaid adminiſtrator, and paid by him.* This is no good evidence to maintain the iſſue; for he to whom the adminiſtration is granted is a mere ſtranger, and what he did is without warrant, and therefore it is no adminiſtration to prove the iſſue. Le. 154, 155. pl. 215. Trin. 32 Eliz. C. B. Hawkins v. Lawſe.

4. *Debt* was brought *by original writ againſt an adminiſtrator in another county than where he was commorant*, and *before he had notice of this action he paid ſeveral debts* of the inteſtate *due by ſpecialties, and ſo he had not aſſets to pay* the debt demanded, *though he had aſſets at the day of the teſte of the original.* And now the defendant appearing, pleaded this ſpecial matter, and concluded, viz. and ſo nothing remained in his hands; and it was held per Cur. to be a good plea. Le. 312. pl. 434. Trin. 32 Eliz. C. B. Corbet's caſe. 2 Le. 60. pl. 88. S.C. in totidem verbis.

5. A man may plead plene adminiſtravit ſpecially as *debt againſt executor*, who *pleaded three judgments of* 100 *l. a-piece, and that he had paid* 40 *l. in full ſatisfaction of two* of the judgments, *and that he hath not had, &c. præterquam the ſaid* 40 *l.* and 20 l. more, which is not ſufficient to pay the other; whereupon the plaintiff demurred, and judgment for the defendant, for it is a pleinm' adminiſter ſpecial. Hob. 218. pl. 284. Trin. 15 Jac. Kid v. Chinely.

6. In debt againſt executors they *pleaded that they had fully adminiſtered all the goods except a term, which term they had refuſed;* and it was adjudged againſt the executor contrary to 21 H. 6. 24. Lat. 261. Arg. cites Paſch. 17 Jac. B. R. Manly v. Moody.

[350] 7. *Debt* is brought againſt an executor, the *executor is outlawed upon the ſaid action* of debt; he *reverſes the outlawry;* the ſame *plaintiff brings a new action* againſt him; he *pleads plene* adminiſtravit; it is a good *replication* that he had *aſſets on the day of the firſt writ purchaſed;* for the defendant ſhall not take advantage of his own wrong by contempt of the law, if the plaintiff brought the ſaid new writ in convenient time. Jenk. 300. pl. 77. 17 Jac. C. B.

Hob. 127. pl. 160. Trin. 13 Jac. Warner v. Kirby. S. P. held accordingly.

8. *Debt* againſt an executor; the queſtion was, whether he may plead plene adminiſtravit, and give in evidence a debt in which *the teſtator was indebted to him?* or, whether he may plead the ſpecial matter, that plea amounting but to the general iſſue? Hobart ſaid, *if no ſpecial matter may be alleged to the contrary, the defendant ſhall be compelled to plead the general iſſue,* and this is good diſcretion in the Court, to take away the perplexity of pleading, becauſe one plea is as good as the other; to which Winch being only preſent agreed, and it was ordered that the defendant here plead accordingly. Win. 19. Trin. 19 Jac. Ayleſworth v. Harriſon.

9. *Charitable legacies* are to have the priority of other legacies. Per North Keeper. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

10. In *ſcire facias* againſt the defendant as executor he pleads fully adminiſtered, to which the plaintiff demurred, becauſe this is no plea againſt a judgment had againſt the teſtator, which binds the goods, cites Mo. 858. pl. 1178. Harcourt v. Reynan, and the executors ſhall not be allowed all charges againſt the judgment; but per Cur. the defendant cannot plead better, and on payment of inferior debts it is a devaſtavit, and the *defendant need not ſhew how he hath fully adminiſtered, or that he had no aſſets then or ſince,* and judgment for defendant, but that none prayed it. 2 Keb. 736. pl. 32. Mich. 22 Car. 2. Smith v. Rawſon.

11. In *ſcire facias* againſt the defendant as adminiſtrator of R. the defendant pleads plene adminiſtravit, which is ill; and *he ſhould ſay nothing came to his hands after the death of the teſtator;* but iſſue being thereon, it is well enough. 2 Keb. 762. pl. 32. Hill. 22 & 23 Car. 2. Lane v. Merryweather.

3 Keb. 258. pl. 2. Hutchinſon v.

12. Judgment againſt the teſtator in debt, and upon a *ſcire facias* againſt his executor he pleaded plene adminiſtravit generally.

It was moved to amend the plea, becauſe the *defendant ſhould have pleaded ſpecially*. Per Hale Ch. J. the judgment binds the goods, and therefore it ſhall be preſumed that the ſame were rightfully adminiſtered; and Twiſden ſaid it had been adjudged a good plea, *but let it be amended if the defendant will*. Raym. 230. Mich. 25 Car. 2. B. R. Bradley v. Hutchinſon.

Hutchinſon. S. C. but Hale Ch. J. held the plea is ill, and he muſt ſhow how he hath paid, be-

cauſe there ſhall no other judgment be preſumed, unleſs it be ſhewed that another is paid off; but by Twiſden and Wild this plea is good enough, as upon a bond, and it is ſufficient on evidence to ſhew payment of debt of as high a nature; but Mr. Solicitor Jones for the defendant ſaid, the opinions had been both ways, and he durſt not venture it being on a ſpecial demurrer, and therefore prayed leave to amend, and ſhew ſpecially how.——Raym. 230. Marg. ſays, that in a ſcire facias upon a judgment this plea was adjudged naught in B. R. Paſch. 1659. Per Glyn Ch. J.

13. In *debt* againſt executor, he *pleaded that he had no notice of the action till* the 27th of March, &c. *before which day he had fully adminiſtered*, &c. The plaintiff demurred, becauſe he did *not ſay that he was commorant in another county*; for if he be commorant in the ſame county, he muſt take notice at his peril. But Vaughan Ch. J. was of opinion e contra, and ſaid he had conferred with Ld. Ch. J. Hale, who ſaid that in B. R. they always uſed to have *expreſs notice*, or otherwiſe the party not to be charged for any thing adminiſtered after the præcipe. Freem. Rep. 54. pl. 69. Mich. 1672. Nightingale v. Lee.

Ibid. 110. 112. pl. 131. S. C. argued again, and Vaughan Ch. J. ſaid that there can be no difference at all as to notice whether the party be in

the ſame or another county; only when he is in another county, then it is impoſſible * that the ſheriff could ſummon him to give him notice. Sed adjornatur. 3 Keb. 171. pl. 7. S. C. adjornatur.

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14. The *teſtator left a perſonal eſtate to the value of* 2000*l.* *and owed* 500*l.* *on ſpecialties, and* 500*l.* *more upon ſimple contract, and diſpoſed of* 400*l.* *in legacies*, and made the defendant *executor durante minore ætate* of his ſon; the executor *paid* 1400*l.* *in diſcharge of the ſaid debts and legacies, and accompted with the infant executor when he came of age, and upon payment of* 91*l.* *reſiduum* to him, he *releaſed to him all actions*. Afterwards an *action was brought againſt him by an executor of one of the creditors of his teſtator*, and upon pleading plene adminiſtravit, the jury found that J. had paid ſuch and ſuch debts and legacies, and had delivered up all the reſidue of the perſonal eſtate of the teſtator to the infant executor when he came of age; it was objected by Atkins J. that this verdict did not maintain the plea of plene adminiſtravit; for that cannot be pleaded unleſs all debts, &c. are diſcharged as far as the aſſets will reach, whereas here the reſiduum is delivered over, and that is liable to the payment of this debt which is yet undiſcharged; but the three juſtices held, that howſoever he diſcharges himſelf of the teſtator's eſtate, he may plead this plea, and that it is his ſafeſt plea. Mod. 174. pl. 10. Paſch. 26 Car. 2. C. B. Brooking v. Jennings.

15. On a *ſcire facias* againſt the executors of the plaintiff *in replevin* to know why he ſhould not have execution of ret' habend' *adjudged on verdict againſt the teſtator*; the defendant *pleaded fully adminiſtered all but one cow*; to which the plaintiff demurred. And by Rainsford and Wild, *this cow being in cuſtodia legis is in his hands, and ſo aſſets*; and if an averia elongata be returned, a writ

of withernam ſhall be de bonis teſtatoris; and if the ſheriff return the teſtator had no goods, on a ſcire facias with a fieri facias, there remains no remedy, but as on devaſtavit; and judgment for the plaintiff niſi. 3 Keb. 463. pl. 40. Paſch. 27 Car. 2. B. R. Green v. Sutcliffe.

16. Aſſumpſit againſt an executor, who *pleaded ſeveral bonds owing by the teſtator not ſatisfied, and that plene adminiſtravit all the goods which the teſtator had at the time of his death, præterquam bona, &c. ad valentiam* 10*l.* Upon demurrer to this plea it was adjudged ill, becauſe the plea relates to the time when it was pleaded; and if iſſue had been joined upon it, the defendant might give in evidence at the trial, that after the writ brought, and before the plea pleaded, he had paid debts upon contract without ſuit; and for want of the intervenient clauſe, *et quod ipſe nulla habet bona vel catalla teſtatoris, vel habuit die impetrationis brevis præd' vel unquam poſtea, præterquam* goods and chattels to the value of 10*l. which are not ſufficient to ſatisfy the debts due on the bonds* with which they ſtand charged, and this would have made the plea good, but as the pleading is, the plaintiff had no remedy but to demur, and therefore judgment was given for the plaintiff. 3 Lev. 28. Mich. 33 Car. 2. C. B. Heblet v. Framingham.

2 Keb. 218. pl. 60. S.C. ſays the demurrer was becauſe he is charged

17. Adjudged upon demurrer that plene adminiſtravit is no good plea *in* an action of *debt* brought againſt an executor or adminiſtrator *in the debet and detinet* as for rent. Sid. 334. pl. 19. Paſch. 19 Car. 2. B. R. Auſtin v. Miller.

in reſpect of perception of the profits, but if it were in the detinet only it were a good plea, which the Court agreed, and judgment for the plaintiff.

18. Caſe, &c. againſt an executor upon plene adminiſtravit pleaded; Holt Ch. J. declared, that the *plaintiff muſt prove his debt, or elſe he ſhall recover but a penny damages though there be aſſets*, becauſe this plea only admits the debt, but not the quantum; that all ſeparate debts mentioned in the inventory ſhall be ac-
[ 352 ] counted aſſets in the executor's hands; for it is as much as to ſay that they may be had on demand, unleſs a demand and refuſal is proved. 1 Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelley's caſe.

19. Upon a plene adminiſtravit Holt ſaid, if an *inventory* be produced *where there is one particular of good and bad debts*, the defendants ſhall be charged with the whole, becauſe he doth not diſtinguiſh them, unleſs he can diſcharge any part of it by ſpecial evidence. Comb. 342. 7 W. 3. B. R. Anon.

20. At Guildhall, upon plene adminiſtravit the queſtion was, if the defendant ſhall be allowed the *payment of a quarter's rent accrued due within four or five days after the death of the inteſtate*, he having received all the profit of the land till within ſuch a ſmall time? It was objected that this was not a debt due tempore vitæ of the inteſtate, and therefore it not being his debt it ought not to be allowed to be paid out of his eſtate. On the other ſide it was ſaid, that it will be hard that an executor or adminiſtrator ſhall pay a rent out of his own eſtate when the inteſtate, &c. had

received

received all the profits, except for two or three days; and Holt Ch. J. seemed to incline, that if this was a *term continuing after* the death of the inteſtate, that the adminiſtrator ſhall be allowed for the rent; *otherwiſe if it be determined by his death.* Skin. 649, 650. pl. 8. Trin. 8 W. 3. B. R. Mitchel v. Meeſe.

21. In debt by huſband and wife againſt an executor who pleaded plene adminiſtravit; and upon iſſue it was proved, that the executor had *diſcharged a debtor of the* inteſtate *out of Ludgate, taking a bond* from him for the debt, and it *appeared* that he was ſo extreme poor that he was *downright ſtarving;* yet the debt was judged aſſets in executor's hands. 12 Mod. 346. Mich. 11 W. 3.

22. It was moved to plead double *non aſſumpſit* and *plene adminiſtravit,* which was denied by the Court, *no affidavit* being *produced that defendant had fully adminiſtered.* Notes in C. B. 234. Mich. 8 Geo. 2. Heathfield v. Allen.

Caſes of Pract. in C. B. 153. S. C. ſays that the motion was granted.——See the note at the next plea.

23. On motion to plead double, *ſolvit ad diem* and *riens per deſcent,* it was objected that an *affidavit of the fact* as to riens per deſcent ought to be produced from the heir as from an executor or adminiſtrator in a plene adminiſtravit, and the objection was held good. No rule. Notes in C. B. 234. Mich. 8 Geo. 2. The Burgeſſes of Wiſbech v. Frier.

Caſes of Pract. in C. B. 153. S. C. and ſays that the motion was granted.—Ibid. 154. The reporter adds a note, that affidavit muſt be made by the executor or adminiſtrator, that he hath fully adminiſtered, and by the heir that he has nothing by deſcent, before motion.

## (Z. a. 12) Pleadings by Executors or Adminiſtrators. Fraudulent.

1. DEBT was brought againſt an executor who *pleaded a former recovery againſt him for* 200 *l. and that execution iſſued; and pleaded alſo another judgment had againſt him for* 100 *l. abſque hoc that he had aſſets to ſatisfy that execution of* 200 *l.* This was adjudged a good plea, and the plaintiff muſt reply, that he had aſſets in his hands ultra the 200 l. and ultra the 100 l. for before thoſe are ſatisfied, the plaintiff was not intitled to his debt. Cited by Vaughan Ch. J. Vaugh. 105. as 19 E. 4. 12. b. [ 353 ]

2. In *debt againſt the defendant as executor,* he *pleaded plene adminiſtravit;* the *jury found that his wife was executrix, and that ſhe, to deceive his creditors, made a gift of the goods before marriage, but ſtill kept them in her poſſeſſion; and afterwards married the defendant, and died, and that he had ſo much of the goods as are ſufficient to ſatisfy the creditors;* adjudged for the plaintiff, becauſe the defendant, by pleading plene adminiſtravit, had confeſſed himſelf to be executor, and therefore is chargeable; for the property of the goods did not paſs out of the wife by the grant, it being made by fraud. Mo. 396. pl. 518. Hill. 37 Eliz. Watſon's caſe.

Cro. E. 403. pl. 16. Wilcocks v. Watſon. S. C. adjudged by all the juſtices præter Fenner.

8 Rep. 132. Paſch. 8 Jac. C. B. Turner's caſe, alias Turner v. Lawrence, S. C. adjudged.

3. A. brought *debt* on a bond of 100l. againſt B. and others adminiſtrators of C. The defendants *pleaded* in bar *divers former recoveries* againſt them in debt, and that they *had not aſſets præterquam bona & catalla quæ non attingunt ad valorem* of the ſaid debts recovered. The plaintiff *replied, that the defendants* ſince the recoveries *did pay part* of the debts *in full ſatisfaction*, wherewith they held themſelves content, and offered to acknowledge ſatisfaction, but the defendants did refuſe to agree to that, to the defrauding of the plaintiff; and adjudged that the plaintiff ſhould recover; for an executor ought to execute his office truly. Bridgm. 80. cites 8 Rep. Turner's caſe.

9 Rep. 108. a Paſch. 10 Jac. C. B. Treſham's caſe, S. C. reſolved accordingly. Ibid. 110. the 3d reſolution.— Brownl. 151.

4. In an action of debt againſt an adminiſtratrix who *pleaded ſtatutes, and further that ſhe had not ſufficient*, &c. the plaintiff *replied*, that for one of the ſtatutes *a leſſer ſum was accepted in ſatisfaction*, and as to the other, that it was for performance of covenants, and that none was broken; and the defendant demurred; and adjudged for the plaintiff, and that the *general averment of payment and acceptance*, and that the ſtatute was for performance of covenants was good, becauſe the plaintiff was a ſtranger thereto. Bridgm. 80, 81. cites 9 Rep. 108.

Brokeſby and Vaux v. Treſham, S. C.

5. If *judgment* were had againſt an executor by *covin*, the plaintiff may *traverſe generally*; but ſuppoſe that the judgments were *had upon good cauſe, and after comes an agreement* as *to pay ſo much a month in ſatisfaction, and in the mean time to keep the judgment on foot*, in this caſe the keeping the judgment on foot is traverſable, and the payment is but inducement, and matter of inducement ſhall never be traverſable; per Doderidge J. Lat. 111. Hill. 1 Car. Beaumont's caſe.

S. C. cited 4 Mod. 64. as adjudged in C. B. and affirmed on a writ of error in B. R.— Show. 289. S. C. cited Arg. and Ibid. 290. Holt Ch. J. mentions the exception in that caſe for not ſaying nec eor' aliq', and ſaid, he thought that hard enough, for in a general iſſue you muſt ſay nec eor' aliq', but in a ſpecial bar you need not; for if falſe in part it is ſo in all.

6. *Debt againſt an executor* upon an obligation. The defendant *pleads ſeveral judgments ultra quod he had not aſſets*. The plaintiff *replies that thoſe judgments were kept on foot by fraud*. The defendant *rejoins, that the ſaid ſeveral judgments were not kept on foot by fraud*, and doth *not ſay, nor either of them*; and it is poſſible, that if one only be kept on foot by fraud it may cheat the plaintiff of his debt; and for this cauſe judgment was given for the plaintiff. Freem. Rep. 121. pl. 141. Trin. 1673. Waterhouſe v. Symonds.

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7. Debt upon bond againſt an adminiſtrator, who pleaded a judgment againſt his inteſtate in Hillary term, 26 Car. 2. and that he had not aſſets ultra, &c. The plaintiff *replied, that* an action was then brought againſt *the inteſtate*, but that he *died before judgment, and that it was obtained after his death, and kept on foot by fraud*. The *defendant traverſed the fraud, but did not anſwer the death*

*death of the inteſtate;* and upon a demurrer it was inſiſted for the plaintiff, that the judgment was ill, and that he being a ſtranger to it could neither bring error or deceit, and had no other ways to avoid it but by plea, and the Court held that the *plaintiff might avoid the judgment without writ of error, eſpecially in this caſe, where it is not only erroneous but void.* 2 Mod. 308. Trin. 30 Car. 2. C. B. Randal's caſe.

8. Indebitatus aſſumpſit againſt an executor who pleaded ſeveral judgments, &c. and that he had not aſſets ultra. The plaintiff *replied particularly to each judgment, and averred that they were kept on foot by fraud.* The defendant in his rejoinder put all the judgments together, and ſaid that they *were not kept on foot by fraud;* and upon a demurrer the queſtion was, whether he ſhould not have made ſeveral rejoinders to all the judgments particularly, and not have put them altogether? but per Cur. the *plaintiff need only aver in his replication that ſeparalia judicia prædicta are kept on foot by fraud, and then this rejoinder had been good likewiſe.* 4 Mod. 63. Mich. 3 W. & M. in B. R. Beak v. Kent.

Show. 289. S.C. and by Holt Ch. J. the plaintiff need not aver fraud to every one, if to any, it is enough to avoid their bar, or he might generally have ſaid that judicia ſeparalia prædicta were kept on foot by fraud.——Carth. 195. S. C. and the Court held the rejoinder good, becauſe the traverſe was that all or any of the judgments were kept on foot by fraud; and if iſſue had been joined that all were kept on foot by fraud, and it had been found that one alone had been, this iſſue had been found for the plaintiff, becauſe the plea was falſe in part, and therefore the whole is falſe, and conſequently this general form of pleading could be no diſadvantage to the plaintiff, (as is pretended;) for he might have taken iſſue that all were continued by fraud, or elſe he might have ſingled out one of the judgments, and taken iſſue upon that alone. The plaintiff ſeeing the opinion of the Court, prayed leave to diſcontinue, which was granted.

9. If there is a fraud in the pleading of judgments or ſpecialties the executor's *iſſue muſt be taken on the fraud;* for if you reply a compoſition made, and that yet the judgment is continued by fraud, ſtill it is the fraud that is traverſable; and *if one pleads ten judgments, and one of them is by fraud, he has confeſſed aſſets at leaſt to the full value of the judgment.* 12 Mod. 528. Gould J. cited DEAL v. GILESTON, and WORKHOUSE v. SIMON, and ſaid it had been held in C. B. that a traverſe of the compoſition had been well.

10. Debt upon a bond againſt an *adminiſtrator* who *pleaded ſeveral judgments, and nihil ultra 5l.* The plaintiff *replied, as to one judgment there was but ſo much due, which the creditor was willing to accept in full, and that the defendant by fraud deferred the payment of that money, and kept the judgment on foot to defraud the creditors, and replied the ſame thing as to another judgment, and demurred as to the reſt.* The defendant *rejoined, that as to one judgment it was not kept on foot by fraud, &c. and as to another no aſſets ultra ſo much, and ſo to the 3d, and* as to the reſt he joined in demurrer; adjudged, if it appears that the debtee was willing to take leſs than is recovered, this is evidence of fraud, but if it is ſhewed that the adminiſtrator had not aſſets to pay that ſum, it is no fraud, and that the concluſion of the replication with hoc paratus eſt verificare as to every judgment is well enough, but a general concluſion to all had been better. 1 Salk. 311. pl. 16. Trin. 13 W. 3. B. R. the 4th and 6th reſolution in caſe of Parker v. Atfield.

Ld. Raym. Rep. 678. S. C. adjudged.

## (Z. a. 13) Pleadings. In what Caſes he muſt name himſelf, or be named Executor or Adminiſtrator.

1. DEBT *by one executor;* the *defendant ſaid that there is another alive; judgment of the writ,* the *plaintiff ſaid that he is diſcharged of the adminiſtration and never adminiſtered,* and yet the writ was abated, becauſe he *may adminiſter when he pleaſes.* Br. Executor, pl. 27. cites 41 E. 3. 22.

2. *Debt againſt adminiſtrators;* it was agreed that if the defendant *ſays that the party made him and another executor who proved the teſtament,* judgment of the writ brought againſt him as adminiſtrator, and the *plaintiff ſays that he died inteſtate,* priſt, and the *defendant would have eſtopped him by the teſtament proved under the ſeal of the ordinary; & non allocatur.* Br. Adminiſtrator, pl. 11. cites 44 E. 3. 16.

3. An *executor who refuſes and takes adminiſtration before the ordinary, ſhall be impleaded as adminiſtrator, but executor in right and executor de ſon tort demeſne* ſhall *not* be impleaded as adminiſtrator, but as executor in pain of abatement of the writ. Br. Adminiſtrator, pl. 15. cites 50 E. 3. 9.

4. If executor brings *raviſhment of ward* of a raviſhment *in time of teſtator,* he ſhall be named executor in this action; *contra of a taking out of his own poſſeſſion,* there he need not be named executor. Br. Executor, pl. 122. cites 7 H. 4. 2.

So if the one aſſigns auditors, &c. the action of debt upon the account ſhall be in the names of both by the name of executors; for this thing, viz. the debt, was never in their poſſeſſion. Per Keble. Br. Executor, pl. 101. cites 2 H. 7. 15.

5. *Executors aſſign auditors to the bailiff,* and he is *found in arrearages,* and they *brought debt not naming them executors,* and *counted how he was in arrearages to the teſtator who made them executors, and they aſſigned auditors;* the writ abated per Cur. becauſe they are not named executors in the writ; and this exception ſhall be pleaded to the writ; quod nota. Br. Executor, pl. 12. cites 9 H. 6. 11.

6. Debt *againſt executor,* he *ſaid that the teſtator made him and J. S. his executors, who adminiſtered and is alive,* &c. *not named,* judgment of the writ; and the *plaintiff ſaid that he made the defendant executor, abſque hoc that he made J. N. executor,* and ill; by which he *ſaid ut ſupra, abſque hoc that he made both executors;* and the other e contra; note a diverſity; *for where it is brought* * *againſt executor,* it *is no plea* to ſay that there is another executor alive *if he does not ſay that he has adminiſtered; but where it is brought* † *by executor it is a good* plea to ſay that there is another executor alive, though he does not ſay that he has adminiſtered; for if the one adminiſters, the action ſhall be brought in the name of him and of all the others; but the action ſhall not be brought againſt him who does not adminiſter; note a diverſity. Br. Executor, pl. 20. cites 33 H. 6. 38.

* S.P. Ibid. pl. 13. cites 9 H. 6. 44. —— S. P. and iſſue thereupon. Br. Executors, pl. 69. cites 19 H. 6. 31. for he ſhall not be named unleſs he adminiſters. —— S. P. Ibid. pl. 88. cites 9 E. 4. 12. ——

† S. P. Ibid. pl. 13. cites 9 H. 6. 44. —— S. P. in account by executors, to which the plaintiff ſaid, that after

after this the teſtator made the plaintiff his ſole executor at B. in the county of M. &c. To which the defendant ſaid, that the truth is, that he made the plaintiff his ſole executor, but after this he made the plaintiff and the other his executors, abſque hoc that he made the plaintiff his ſole executor after this, &c. and at laſt he was compelled to ſhew at a day in this term in his rejoinder, that ſuch a day he made both his executors, abſque hoc that he made the plaintiff his ſole executor after this day; quod nota. Br. Executor, pl. 21. cites 33 H. 6. 44.

* So where four are made executors, and the one, or all except one, refuſe before the ordinary, and the one proves the teſtament, in debt by him he and all the others ſhall be named; for the teſtator cannot die teſtate and inteſtate; per all the juſtices except Danby. Ibid. pl. 24. cites 35 H. 6. 35, 36. ——S. P. Ibid. pl. 69. cites 19 H. 6. 31. ——S. P. Ibid. pl. 88. cites 9 E. 3. 12. 314. but ſhould be 9 E. 4. 12. ——S. P. if there are 20 executors, and one only proves the teſtament, they may proceed jointly or be ſevered if the others will not ſue. Ibid. pl. 117. cites 21 E. 4. 24. per tot. Cur.

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7. *Debt againſt a feme executrix of the teſtament of her huſband;* the *defendant demanded judgment of the writ; for the baron died inteſtate, and the ordinary committed the adminiſtration to her*, and ſo ought to be named adminiſtratrix, and not executrix; judgment of the writ; the *plaintiff demanded oyer* of them; and *ſhe ſhewed the letters, which would that the ordinary ordain the feme collector ad petend' levand' colligend' et exigend' omnia bona*, catalla et debita *defuncti, & illa venditioni exponend', et denarios inde ad manus ordinarii ſolvend'*, &c. *ac plenum inventorium inde conficiend'*, &c. *debitoreſque acquietandi*, &c. *poteſtatem committimus.* Per Fairfax, it appears that *ſhe is not intire adminiſtrator, therefore the writ is good.* Per Brian Ch. J. *debt does not lie againſt a particular adminiſtratrix*, as where the adminiſtration is committed of all things which ſounds in action, debt lies not, *but againſt ſuch who has adminiſtration omnium bonorum & catalla defunct'*, &c. by which, anſwer; quod nota. Br. Adminiſtrator, pl. 34. cites 16 E. 4. 1, 2.

8. If a *feme* be *executrix* and *takes baron*, and after *ſhe delivers money to J. S.* and her *baron dies*, and *ſhe brings a writ of account, and does not name herſelf executrix*, and yet well; becauſe it was a thing which was once in her poſſeſſion; per Keble. Br. Executor, pl. 101. cites 2 H. 7. 15.

9. In *debt by adminiſtrators or againſt them*, all ſhall be named, *but* in debt *againſt executors* it ſuffices to name thoſe who adminiſter, *but* in debt *by executors* all ſhall be named, and in debt againſt one as heir he ſhall be named heir, and it ſhall be debet and detinet. Br. Dette, pl. 183. cites the Regiſter.

10. If *goods are taken out of the poſſeſſion of one executor* where there are ſeveral executors, he alone may maintain an action, and that without naming himſelf executor. Went. Off. Ex. 104.

11. In *detinue for goods delivered to* and detained by *teſtator, and now detained by executor*, he need not be named executor; for he ſhall not anſwer damages for his teſtator's detaining. Went. Off. Ex. 192, 193.

12. *Debt againſt an executor*, who *pleaded that J. S. is co-executor* with him *not named in the writ;* judgment of the writ; *but does not aver that the other had adminiſtered.* Upon which the plaintiff demurred, and the plea was adjudged ill; for although when an executor ſues, the defendant may plead another executor not named without ſhewing that the other has adminiſtered, for he may not know whether he has adminiſtered or not; yet when an executor is ſued, if he plead another executor not named, he ought

Sid. 242. pl. 3. S. C. Judgment that defendant reſpondeat ouſter. ——Keb. 865. pl. 10. Swallow v. Emerſon, S. C. ad.

judged for the plaintiff.

ought moreover to ſay that he has adminiſtered; for this lies in his knowledge. 1 Lev. 161. Paſch. 17 Car. 2. B. R. Swallow v. Emberſon.

[357] (Z. a. 14) Bond to the Ordinary; and in what Caſes Executor muſt account in the Spiritual Court.

1. A. *After many legacies deviſes the reſidue of all his goods to one Taylor, and makes Trott his executor* and dies. *Trott after accounts before the ordinary*, &c. *and pays the reſidue to Taylor, and thereupon has an acquittance* from the ſaid Taylor. *Trott dies, and Taylor ſues his executor in the court of requeſts to account de novo.* The *executor pleads the acquittance*, and the plaintiff thereupon demurred. Cook Attorney General prays a prohibition, and the Court ſaid that an executor ſhall not be compelled to account in any Court, although the court of conſcience; but by the Court it was agreed, that an executor of an executor may be ſued for a legacy given by the firſt teſtator. Noy, 3. Hill. 2 Jac. B. R. Taylor v. Trott.

Hob 83. pl. 110. Slawney's caſe, S. C. & S. P. held clearly.

2. The Court ſeemed that the ordinary cannot take an *obligation of the adminiſtrator, that after the debts and legacies paid he will diſtribute the reſidue of the goods at the appointment of the ordinary.* Mo. 864. pl. 1191. Hill. 13 Jac. Slawney v. Elbridge.

——Lev. 233. Hill. 19 & 20 Car. 2. B. R. Hughs v. Hughs, reſolved that bonds taken by the eccleſiaſtical court to oblige the adminiſtrator to diſtribution are void. ——But ſee ſtat. 22 & 23 Car. 2. cap. 10. infra, pl. 7.

As to the diviſion of the goods which on an appeal was ordered by the delegates, a prohibition was granted. Noy, 24. Took's caſe.

3. An *adminiſtrator* is ſued in the ſpiritual court to make an *account*, and a prohibition was denied; but otherwiſe it had been if to make a *diviſion of the goods*. Noy, 24. Mich. 15 Jac. Mountague v. Clerk.

——Ibid. cites Paſch. 16 Jac. C. B. Lanch v. Roſſe, where a prohibition was granted as to making a diviſion, but otherwiſe as to rendering an account.

Ibid. ſays, nota the ſtat. 21 H. 8. gives power to the ordinary, but not for accounts by executors.

4. *But* if an *executor* be ſued in the ſpiritual court to account, a prohibition will be granted. Noy, 28. Mich. 15 Jac. Sparrow v. Norfolk.

5. The ordinary has no power to hold plea to try *payment or not payment*, or to adminiſter an interrogatory to a witneſs, but ought to *accept the account as it is*; for the creditors may ſue for their debts at the common law, and then payment or not payment ſhall be well tried, and there one witneſs will ſuffice. Noy, 78. Bellamy v. Alden.

6. The *ſpiritual court try* plene adminiſtravit *per teſtes*; but if they refuſe ſuch proof as is allowable at common law in diſcharge of the

the party, a *prohibition will go.* 3 Bulſt. 315. Mich. 1 Car. B. R. Dickes v. Brown.

*[358] 7. 22 & 23 Car. 2. *cap.* 10. *ſ.* 1. *All ordinaries and eccleſiaſtical judges, having power to commit adminiſtration, ſhall, upon their granting adminiſtration of inteſtates goods, take bonds with ſureties, two or more, in the name of the ordinary, with this condition, viz. the condition of* * *this obligation is ſuch, that if the within bounden* A. B. *adminiſtrator of all and ſingular the goods, chattels, and credits of* C. D. *deceaſed, do make, or cauſe to be made, a true and perfect inventory of all and ſingular the goods, chattels, and credits of the ſaid deceaſed, which have or ſhall come to the hands, poſſeſſion, or knowledge of him the ſaid* A. B. *or into the hands and poſſeſſion of any other perſon or perſons for him; and the ſame ſo made do exhibit, or cauſe to be exhibited, into the regiſtry of court, at or before the day of next enſuing; and the ſame goods, chattels, and credits, and all other the goods, chattels, and credits of the ſaid deceaſed, at the time of his death, which at any time after ſhall come to the hands or poſſeſſion of the ſaid* A. B. *or into the hands and poſſeſſion of any other perſon or perſons for him, do well and truly adminiſter according to law; and further do make, or cauſe to be made, a true and juſt account of his ſaid adminiſtration, at or before the day of and all the reſt and reſidue of the ſaid goods, chattels, and credits, which ſhall be found remaining upon the ſaid adminiſtrators account, the ſame being firſt examined and allowed of by the judge or judges for the time being, of the ſaid court, ſhall deliver and pay unto ſuch perſon or perſons reſpectively, as the ſaid judge or judges, by his or their decree or ſentence, purſuant to the true intent and meaning of this act, ſhall limit and appoint; and if it ſhall hereafter appear that any laſt will and teſtament was made by the ſaid deceaſed, and the executor or executors therein named do exhibit the ſame into the ſaid court, making requeſt to have it allowed and approved accordingly, if the ſaid* A. B. *within bounden, being thereunto required, do render and deliver the ſaid letters of adminiſtration (approbation of ſuch teſtament being firſt had and made) in the ſaid court; then this obligation to be void and of none effect, or elſe to remain in full force and virtue.*

Since the ſtatute of 22 Car. 2. an adminiſtrator by virtue of the obligation entered into by him to the ordinary, on taking letters of adminiſtration, is bound to give in his account in the ſpiritual court without being cited; and a perſon intitled to diſtribution by that ſtatute may ſue the adminiſtrator for an account, as a legatee might have done before that ſtatute, for the next of kin is a legatee by the ſtatute, and as a ſtatute legatee ſhall have the ſame remedy as the other legatees might before the ſtatute; but a debtor cannot ſue the adminiſtration bond for non payment of a debt to him, or a devaſtavit committed by the adminiſtrator. 1 Salk. 315. pl. 14. Hill. 6 Ann. B. R. Canterbury (Archbiſhop) v. Wills. —— 11 Mod. 145. Canterbury (Archbiſhop) v. Willet, S. C. and by Holt Ch. J. an executor is bound to account, but a creditor muſt take the account as the executor has made it upon oath; but if a legatee comes he may unravel the account, becauſe it is the only court for him to ſue in, and therefore he is not bound by that account; but if the executor will pay him his legacy, then he cannot compel him to exhibit an inventory, or to account, becauſe he has the end of his ſuit; and cites Raym. 470.

H. was bound in a bond according to the ſtatute 22 & 23 Car. 2. cap. 10. that C. the adminiſtrator ſhould bring in a full inventory, and a diſtribution was decreed by the commiſſary and judge of the court in Sudbury in Suffolk to ſeveral of the inteſtate's relations, which the adminiſtrator would not comply with, and therefore was excommunicated. The defendant craved oyer of the bond, and pleaded that there was an account given in, and iſſue joined that there was no ſuch account, and puis darrein continuance he comes and offers a plea of a releaſe. Exception was taken; for if it ſhould be in the commiſſary's power to releaſe this bond, the ſtatute would be of no force. And per Powell J. the doctor has not done well in giving this releaſe, and it is a breach of truſt; quære quid inde venit. Holt's Rep. 660. pl. 7. Hill. 7 Ann. Butler v. Hammond.

8. The widow in the ſpiritual court ſet up a procurator for her children, the infants, and gets her *account paſſed,* and each child's proportion

proportion aſcertained, and *diſtribution* decreed, and on giving new ſecurity got the old ſecurity diſcharged; the court of *Chancery*, without regard had to the proceedings of the ſpiritual court, decreed an account of the whole eſtate. 2 Vern. 47. pl. 45. Paſch. 1688. Biſſell & Ux' v. Axtel & al'.

9. A perſon who had a *debt due* to him *from the inteſtate by ſimple contract*, but *more than ſix years were elapſed*, was adjudged to be a creditor within the ſtatute 1 Jac. 2. cap. 17. for it is a debt, though barrable by pleading the ſtatute of limitations; and therefore a prohibition was denied. Ld. Raym. Rep. 232. Trin. 9 W. 3. Wainford v. Barker.

[ 359 ] 11. The *ſpiritual court* may try the iſſue of plene adminiſtravit; but if they over-rule this plea, or refuſe to give precedency to debts of a higher nature, and to vary from the common law, they ſhall be prohibited. Cumb. 189. Paſch. 4 W. & M. in B. R. Lady Winchelſea v. Nichols.

1 Salk. 299. pl. 11. S. C. —3 Wms.'s Rep. 337. in a note

12. The *ordinary cannot compel an executor to give ſecurity.* Per Holt Ch. J. Ld. Raym. Rep. 363. Mich. 10 W. 3. in caſe of the King v. Raines.

there cites S. C. from the author's MS. report thereof, wherein it is obſerved, that the ſpiritual court has ſometimes refuſed to grant the probate of a will to an executor who has been reputed a perſon of no ſubſtance, and abſconded for debt, until he ſhould give ſecurity for a due adminiſtration of the aſſets, under pretence that the legacies, which were conſiderable, were in danger of being loſt; and that they might as well reject an executor where he declines giving ſuch ſecurity, as where he refuſes to take the oath of due adminiſtration, which is the common practice. But the court of B. R. has in ſuch caſe inforced the granting of the probate by a peremptory mandamus.

13. One by will gives an *annuity out of his perſonal eſtate*; if the executor has miſbehaved himſelf, the *Court will order part of the perſonal eſtate to be ſet aſide to ſecure this annuity.* 2 Wms.'s Rep. 163. Trin. 1723. Balteu v. Earnley.

14. *Adminiſtration is granted*, and *one adminiſtration bond is taken upon the granting it*; another adminiſtration *bond in a farther penalty cannot afterwards be taken.* Barnard. Chan. Rep. 24. Paſch. 1740. in the caſe of Havers v. Havers.

Fol. 929.

## (A. b) What Acts or Pleas of one ſhall bind his Companion.

Each executor has by law an intereſt in and power over the whole eſtate, and therefore it is that the plea of each

[1.] IN an action upon the caſe againſt four executors, *upon a promiſe made by the teſtator*, if *one executor acknowledges the action, and the other three plead non aſſumpſit*, their plea ſhall be received, becauſe *the plea of that executor which is beſt for the teſtator ſhall be received*; but the executor who acknowledges the action ſhall excuſe himſelf of damages by it. P. 13 Car. B. R. between CHAFFE AND KELLAND, and others; per Cur. that the pleas ſhall be returned. But quære.]

executor ſhall bind the eſtate of the teſtator, Arg. and judgment accordingly. 10 Mod. 324. in caſe of Baldwin v. Church.

Entry ſur diſſeiſin; two executors prayed to be received to ſave their term by the ſtatute of Glouceſter, and after the one made default; and per Rede Ch. J. it ſhall not be the default of both; for that which is moſt beneficial for the teſtator ſhall be taken. Br. Executor, pl. 94. cites 21 H. 7. 25.—

A6

As where they plead two pleas, the plea which is moſt for the benefit of the teſtator ſhall be taken and firſt tried. Ibid. ——— And where they plead a releaſe, and the one makes default after, the other ſhall maintain the releaſe for the advantage of the teſtator. Ibid. ——— S. P. But per Kingſmill J. after they have joined in plea, the default of the one is the default of both. But Brooke ſays, the ſaying of Rede ſeems to be law. And he who relinquiſhed would have ſurrendered and was not ſuffered; for the Court has no warrant but to record his default; the reaſon ſeems to be inaſmuch as he is not party to the original. Br. Receit, pl. 79. cites S. C. ——— Br. Default, pl. 53. cites S. C.

2. If there are *ſeveral executors*, and the *one releaſes* the debt, this is a bar againſt all; and therefore, where there are four executors, and action is brought againſt one of them, and he admits the writ and confeſſes the action, this ſhall bind all the goods of the deceaſed, and payment by one executor ſhall be good for all. [ 360 ] Per Jenny. Br. Executors, pl. 88. cites 9 E. 3. 12. 314. but it ſhould be 9 E. 4. 12.

3. *The ſame* it ſeems of a *receipt by the one* executor, &c. Ibid.

4. *Gift of a chattel* by an executor, *or* his *releaſe* without his companion is good. Br. Done, pl. 46. cites 24 E. 3. 31.

5. A *feme and J. N. were executors*, and the *feme took W. S. to baron*, and the *executors had land and goods of a ſtranger in execution*, and *J. N. the other executor granted their intereſt in the execution to the baron*, and after the *baron granted it to a ſtranger*, and after the baron and feme, becauſe ſhe was executrix, granted it over to another man, and the firſt grant of J. N. good, and the ſecond void; for gift of an executor is good. Br. Executors, pl. 130. cites 24 E. 3. 31.

6. *Account by two* executors; *the one was ſummoned and ſevered*, and *the other ſued forth till the defendant was outlawed, and ſued charter of pardon*, and *ſhewed acquittance of the executor who was ſevered*, and the *other executor ſaid, that the teſtator had deviſed all the reſt of his goods after his debts and exequies paid*; judgment if he ſhall be barred by the acquittance of his companion who was ſevered; per Finch. you ſhall be barred by his acquittance, and ſhall be without remedy, unleſs by account againſt him before the ordinary; and after ſcire facias was ſued againſt the feme, at whoſe ſuit he was outlawed; for the one executor was a feme; and ſo note, that the acquittance is admitted good. Br. Executor, pl. 37. cites 48 E. 3. 14, 15. Br. Scire Facias, pl. 48. cites S. C.

7. But where *two executors* are, and the *one refuſes before the ordinary*, he ſhall not be named with his companion; and by conſequence his releaſe ſhall not bar; per Wich. quod tot. Cur. negavit. Br. Executors, pl. 37. cites 48 E. 3. 14, 15. The releaſe of him who refuſes is a bar where one of them proves the teſtament. Br. Executors, pl. 117. cites 21 E. 4. 24.

8. Treſpaſs by A. and B. *of certain goods taken*, the *defendant ſaid that one C. was poſſeſſed, and made one of the plaintiffs and one D. his executors*, and died; *which D. releaſed to him all actions perſonal*; and by the opinion of the Court a good plea, and yet the plaintiff brought the action as de bonis propriis, &c. Br. Treſpaſs, pl. 12. cites 3 H. 6. 54.

9. *Two executors recover a debt* of their teſtator's, and the *one prayed to have the body in execution*, and the *other prayed fieri facias*; execution

execution ſhall be awarded of the body; for this is *beſt for the teſtator*; per Cotteſmore. Br. Executors, pl. 125. cites 7 H. 6. 6.

10. Debt *againſt two executors*, and the *one appeared*, and the *plaintiff counted upon an obligation of the teſtator*, and the *executor confeſſed the action*, and *judgment was given of the debt and damages againſt all the executors of the goods of the deceaſed*. Br. Executor, pl. 16. cites 28 H. 6. 3. But 19 H. 6. it was ſaid, that it was adjudged by Newton and Paſton, and their companions, that the *plaintiff ſhall recover the debt and damages againſt all the executors of the goods of the deceaſed*, and *if they have nothing* of the goods of the deceaſed, *then againſt him, who acknowledged, of his proper goods. But*, by the reporter, the *damages for his own time ſhall be of his proper goods*. Ibid.

11. Subpœna was ſued, becauſe *two were executors*, and the *one releaſed, without the aſſent of his companion, the debt of the teſtator, where the will could not be performed by reaſon thereof*, as ſurmiſed, &c. and the ſubpœna was ſued againſt him who releaſed, and him who accepted the releaſe. Fineux ſaid, this is not remediable; for each executor has the entire power. But the Chancellor ſaid, [ 361 ] none ſhall go away from the Chancery without remedy; and therefore the one executor ſhall not releaſe alone, and made ſeveral grand reaſons for conſcience, and ſaid that he would take remedy in conſcience. Br. Conſcience, pl. 7. cites 4 H. 7. 4.

12. Note, per Keble, where *two executors are*, and *the one only has the poſſeſſion of the goods*, and a *man takes them* from him, and *he brought treſpaſs*, and the *defendant pleaded the releaſe of the other* executor, this is a good plea; for the plaintiff had not poſſeſſion to him alone, but in right of both executors, and therefore the releaſe of the other is a good bar. Br. Executor, pl. 177. cites 16 H. 7. 5, 6.

13. After *ſummons and ſeverance*, the executor that is ſummoned and ſevered is yet party, for he may *releaſe* the ſuit; per Bendloes. Dal. 51. pl. 17. 5 Eliz.

14. Two executors brought action of debt. The *one was ſummoned and ſevered*, yet he *may releaſe before judgment*; but *after judgment he cannot* acknowledge ſatisfaction, becauſe he is not privy to the judgment; and yet his releaſe before judgment ſhall be a bar, notwithſtanding the ſeverance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

15. One executor ſhall not be charged by the *devaſtavit* made by the other; for the act of one executor ſhall charge the other no further than the goods of the teſtator in his hands amount to, but not to charge him of his own goods. Cro. E. 318. pl. 5. Mich. 36 Eliz. B. R. Hargthorp v. Milforth.

The caſe was, debt againſt the defendants as executors they pleaded fully adminiſtered, and ſo nothing in their hands; it was found that the defendants and A. their mother were made executors, and that A. had adminiſtered and waſted the goods to the value of 600 l. and that the defendants had not goods of the teſtator but to the value of 16 l. and that A. was dead. It was

16. Where they ſhall be charged of the goods of the teſtator, the *nonſuit*, *releaſe*, or other act of one ſhall bind the other; but not, if they ſhall be charged de bonis propriis; cites 11 H. 4. 69. where both do *waſte the goods*, execution ſhall be againſt both, of their proper goods. Cro. E. 318. pl. 5. Paſch. 36 Eliz. B. R. Hargthorp v. Milforth.

was the opinion of the Court, that one executor ſhould not be charged by the devaſtavit made by his companions; and the Court held clear, that the judgment ſhould be of the whole debt, but the execution ſhould be only of the 16 l. which was found in the defendant's hands. —— S. C. cited Barnes's Notes in C. B. 318, 319. Paſch. 8 Geo. 2. in caſe of Champnes v. Browne.

17. If there be two executors, and *one diſſents*, yet the act of the other ſhall be good. Toth. 151. cites Feb. 39 Eliz. Bacon v. Bell.

19. Two executors *made partition of ſpecialties* of their teſtator, and afterwards one releaſes to the debtor a bond, which by the partition belongs to the other, the debtor having notice of the partition; yet Ld. Keeper Egerton would not relieve the other executor. But if the *releaſe* had been *procured by covin*, for a leſs conſideration than the debt really was, the debtor ſhould ſatisfy the overplus. Mo. 620. pl. 846. Mich. 42 & 43 Eliz. in Canc. Anon.

20. Though by one co-executor's *grant of his part of a term* the whole paſſes, yet one may demiſe or grant the moiety *of the land for the whole term*, and ſo may the other, and ſo they may ſettle in truſtees for them a moiety for each, either in ſeveral or undivided. Went. Off. Ex. 99.

21. The *miſ-doing of the one ſhall not charge the reſt*, as both appears by the Book of Entries (fol. 320.), and was alſo held in time of H. 7. (Kelw. 23.) and of this opinion were the judges, in the caſe of WALTER v. SUTTON, in C. B. and ſhortly after in B. R. in caſe of HANKFORD v. METFORD, though neither of the caſes [ 362 ] are printed. Went. Off. Ex. 161.

22. The poſſeſſion of one executor is the poſſeſſion of all the reſt; ſo as if one appearing to a ſuit, and the other making default in whoſe hands all the goods be which are not adminiſtered; *if, I ſay*, here he *that appears pleads that he hath nothing in his hands*, this ſhall be found againſt him; for *whatſoever any of the co-executors hath, he alſo hath, and is in his poſſeſſion*; and ſo ſhall the creditor recover, and have judgment to be ſatisfied out of the teſtator's goods, as in his hands. And therefore, if goods be taken from one, all may maintain an action of treſpaſs thereupon; for the *poſſeſſion of one is the poſſeſſion of all*. But the poſſeſſion of one ſhall not be ſo the poſſeſſion of all as to charge the other's own goods. Went. Off. Ex. 99, 100.

23. In an action of debt againſt two executors, and *plene adminiſtravit* pleaded, an inventory had been exhibited by one of them, and it was holden, the other ſhall not be obliged by it, but the plaintiff ought to prove that he hath actually adminiſtered, and that goods came to his hands, and ſo give him a charge, becauſe he was but executor here of his own wrong, and becauſe the plaintiff could not prove this, he was nonſuited. Clayt. 106. pl. 170. 8 Car. before Whitfield J. Ireland's caſe.

24. Where there are two truſtees of a leaſe, or two executors, *and one waſteth the goods*, the other ſhall not be charged, unleſs he was a *co-actor*. Toth. 152, 153. cites Trin. 9 Car. Townley v. Sherborne. Bridgm. 35. S. C. decreed accordingly with the concurrence of ſeveral judges aſſiſtants. —— Toth. 151. cites Trin. or Mich. 7 Car. Downes v. Wiſeman.

25. In caſe of joint-executors, none is chargeable for more than comes to his hands ſeverally; but yet in that caſe, if, by *agreement* among themſelves, one be to receive and intermeddle with ſuch a part of the eſtate, and another with ſuch a part, *each* of them will be chargeable for the *whole*; becauſe the receipts of each are *purſuant to the agreement* made between both. Per Hale Ch. B. Hard. 314. pl. 5. Mich. 14 Car. 2. in Scacc.

26. Though at law one executor is not anſwerable for the *devaſtavit* of the other, yet in the eccleſiaſtical courts, and by their law, if an executor proves the will, they will charge him, though he intermeddles no further than to pay the legacies; but quære, if that is not only where there is a failer of bringing in an *inventory*. Ch. Caſes, 201. Paſch. 22 Car. 2. Vanbrugh v. Cock and Drybutter.

The queſtion was, where executors join in ſales, if they ſhall be

27. Executors who *all join in a ſale ſhall all be charged, though one only receives the money*, and he afterwards became *inſolvent*. Secus of truſtees. Chan. Prec. 173. pl. 144. Mich. 1701. decreed by Lord Keeper. Aplyn v. Brewer.

anſwerable for the receipts of each other? Ld. Keeper doubted, and would conſider of it. 2 Vern. 504. pl. 453. Trin. 1705. in the caſe of Fellows v. Owen. —— Ibid. 515. pl. 464. S. C. Mich. 1705. decreed that they ſhould not; but that upon payment of the money received by the one into court he ſhould be indemnified. —— 2 Vern. 570. pl. 516. Hill. 1706. S. P. Murrell v. Cox and Pitt, in which caſe the executors divided the money on ſale of ſtock in the Eaſt India Company, decreed accordingly at the Rolls, and on appeal affirmed by the Ld. Keeper.

28. Two executors *join in an acquittance*, but *one only receives the money*, both are chargeable for it to the creditors; but the actual receiver only to legatees. 1 Salk. 318. in Canc. 12 Ann. Churchhill v. Hopſon.

[363] 29. One of the executors was a banker of great credit, and caſhier to many monied perſons, and the other executor having received 500 *l.* of the teſtator's money *paid* it *into his co-executor the banker's hands, and who was the perſon with whom the teſtator intruſted his money* in his life-time; for which reaſon Ld. C. Harcourt thought that the other executor ought not to be charged with that 500 l. he having only truſted him whom the teſtator himſelf in his life-time intruſted, and whom at his death he made one of his executors. Wms.'s Rep. 241. Mich. 1713. Churchill v. Lady Hobſon.

30. A. deviſes a *legacy of* 200 *l. to B. payable at* 15, *and in the interim to be put out by executors*, and deviſed other legacies, *and the ſurplus of his real and perſonal eſtate to C. and D. whom he made executors. D. being an infant, C. proved the will alone. B. being* 15 *applied to C. for the legacy, for which C. paid B. intereſt.* E. guardian to D. the infant executor ſettled accounts with C. relating to A.'s eſtate, and left 100 l. in C.'s hands to pay B. and received intereſt after for the ſhare of D.'s ſurplus. *C. became a bankrupt. B. came into the commiſſion and proved the* 200 *l. legacy as a debt, and received her dividend.* The guardian for D. came in, &c. and received his dividend for the ſurplus belonging to D. left in C.'s hands. *On a bill by B. againſt C. and D. for the legacy, it was decreed that B. ſhould have ſatisfaction againſt D. out of A.'s eſtate come*

to

*to his hands, or what D. or his guardian received for intereſt of the ſurplus or the dividend.* 2 Ld. Raym. Rep. 1320, 1321, 1322. Mich. 1 Geo. in caſe of Spendlove v. Aldrich & al'.

31. Any or either of the executors, though they are only in truſt, may receive and give *diſcharges for money before probate*, eſpecially when (as appeared in the principal caſe) they afterwards proved the will, and ſo were executors ab initio. Agreed. Abr. Equ. Caſes, 319. Hill. 1729. Auſten v. Executors of Sir William Dodwell.

32. Three adminiſtrators *appointed a receiver, who received* a ſum of money for their uſe, *and divided to each adminiſtrator one third part. Two* of the adminiſtrators *afterwards failed.* The queſtion was, upon a point reſerved at niſi prius, whether the third adminiſtrator was liable for the whole ſum, or for his own third part only, to a new adminiſtrator? Per Cur. the defendant is reſponſible for that third part only which he received, and not for a devaſtavit committed by his co-adminiſtrator. *If payment had been made to a wrong perſon, the caſe had been otherwiſe;* but here the money was properly paid. Defendant is not concerned how his co-adminiſtrators diſpoſe of their parts. The three are equally entruſted. Barnes's Notes in C. B. 318, 319. Paſch. 8 Geo. 2. Champney v. Browne.

## (A. b. 2) Joint-Executors; Inter ſe.

### Remedy for one againſt the other. And Pleadings.

1. AN executor ſhall not have an *account againſt his companion.* Noy, 78. in caſe of Bellamy v. Alden, cites 13 E. 3. Executor, 91.

The one cannot force the other to account in Chancery.

Per Serjeant Maynard. Sid. 33. pl. 13. Hill. 12 & 13 Car. 2. in Canc. Aprice v. Flower. But the reporter ſays, quære tamen.

2. *Releaſe to one* executor *ſhall ſerve for all.* Br. Dette, pl. 65. cites 11 H. 4. 83. [ 364 ]

3. If one *executor be poſſeſſed of goods of the teſtator,* and the *other executor takes them from him,* the other has no remedy by any action. Br. Executor, pl. 98. cites 39 H. 6. 27.

4. In treſpaſs; per Brian Ch. J. where a *termor deviſes his term,* the deviſee cannot enter after his death without livery of the executor; by which he *ſaid, that the deviſor made the plaintiff and this defendant his executors, by which he entered;* and per tot. Cur. he may enter and hold in ſeveralty. Br. Deviſe, pl. 24. cites 20 E. 4. 9.

5. Treſpaſs by A. againſt B. who *ſaid that W. was poſſeſſed of the goods, and made the plaintiff and defendant his executors, and died, by which he took the goods,* &c. Judgment ſi actio. *The plaintiff ſaid,* that the *teſtator willed by his teſtament, that when all the debts and legacies were paid, the plaintiff ſhould have the reſt* of the goods which remained,

An executor to whom the reſt of the goods of the teſtator were given after his debts paid,

may retain the same residue against his companion, and if the other executor takes them, he may have trespass against him. Br. Executor, pl. 104. cites 6 H. 7. 5. D. 23. b. pl. 146. Marg. cites 27 H. 8. 22.

remained, *and that they had paid such* debts and legacies, and shewed to whom, &c. *which were all* the debts and legacies, *and the goods in the action were the residue* which remained, *by which the plaintiff took them, and was possessed till the defendant took them*; by which the *defendant said, that such a legacy and such a debt is yet due*, and not paid, *absque hoc, that the debts and legacies alleged by the plaintiff were all the debts and legacies*, &c. and the issue *found for the plaintiff*; and per Cur. the traverse was well taken, and shall come of his part who took it, and not of the other part, and without the traverse the plea is not good; for he *has not confessed and avoided it, and therefore he ought to traverse*. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5.

6. Co-executors cannot make *partition of the goods* between them. Fin. Law, 8vo. 168. cites 17 H. 8. 22. 21 H. 7. 29.

—— Br. Executor, pl. 7. S. P. cites 27 H. 8. 21, 22.

14. *Nor of a term for years*, for they are not like joint lessees, where each has but a moiety in interest, though he has possession of, or though the whole; whereas each co-executor has the whole, and there are *no parts or moieties, because co-executors*. Went. Off. Ex. 98, 99.

7. Note per Cur. that the *one executor cannot give any of the goods of the testator to another*. Br. Executor, pl. 7. cites 27 H. 8. 21, 22.

8. And *if the one dies*, the *other who survives shall have detinue against the executor of him who died*, or against *him who has the possession of them*; quod nota. Ibid.

9. If I make my *debtor and another executor, and debtor dies*, the other executor shall have debt against the executors of debtor, because the action was only in suspence, and not extinct, and so is *revived*; per Keble; Arg. Keilw. 122. b. pl. 75.

10. *Demurrer*, pretending one executor cannot *sue another, was over-ruled*, because the matter is mere testamentary. Toth. 137. cites 20 Eliz. Crocker v. Hamden.

11. A. the plaintiff's brother *devised goods to his two sons, to be delivered at their full age*, and *made the plaintiff and defendant executors*; 100l. of the goods came to the plaintiff's hands, and 250l. came to the defendant's hands. The plaintiff's bill is, that in respect of the trust and joint-charge which may survive, *that the plaintiff and defendant may each be bound to the other to pay* the children their portions in their hands at their full age; and if either plaintiff or defendant die before, then the executor shall pay that which was in the testator's hands to the survivor, which this Court
[ 365 ] thought in conscience to be meet, because the defendant by answer confesses the trust and receipt of 250l. Therefore a subpœna is awarded against the defendant, to shew cause why it should not be decreed. Cary's Rep. 112, 113. cites 21 & 22 Eliz. Cotton v. Causton.

12. *One cannot assign a term to the other*, because he was possessed of the whole term before. Cro. E. 347. pl. 19. Mich. 36 & 37 Eliz. B. R. Pannel v. Fenn.

13. *One*

13. *One* executor *may ſue another* in this court, though not at law. Toth. 150. cites 1585. Allen v. Story, and 39 Eliz. Okely v. Barnard.

15. One cannot give or *releaſe his intereſt to the other;* but it will be void, and the releaſor ſhall ſtill have as much as his releſſee; becauſe each had the whole before, and therefore it was held long ſince, that by ſuch releaſe of his part of a debt, or by grant of his part of teſtator's goods, all was diſcharged or paſſed, becauſe each had the whole, and there are *no parts or moieties between executors.* Went. Off. Ex. 99.

16. *So,* and for the ſame reaſon, the one cannot *make a leaſe* to the other *of any part,* for he had the whole. Went. Off. Ex. 99.

17. A. and B. are joint executors, and the *reſiduum deviſed to them.* A. *dies.* The adminiſtrator of A. ſues B. for an *account,* which was decreed (but to the diſſatisfaction of the Bar). Chan. Caſes, 239. Mich. 26 Car. 2. Cox v. Quantock. Fin. Rep. 176. S. C. ſays, that afterwards on the prayer of counſel to the Ld. Keeper to reverſe his decree, he directed that ſeveral judges be attended with this order, and to certify their opinions, who were ſeverally attended, but gave no opinion; whereupon the Ld. Keeper, upon conſidering the matter again, ordered the bill to be diſmiſſed, but without coſts.——— 2 Freem. Rep. 140. pl. 178. Cox v. Queenlock, S. C. decreed; but ſays that upon a rehearing the Ld. Keeper took the aſſiſtance of Ld. Ch. J. North, and three other judges, who were of opinion that it was againſt the common law in the point of ſurvivorſhip, and would introduce a relief in equity againſt all ſurvivorſhips in caſe of jointenancy; having no other circumſtances in the caſe, and ſo that decree was reverſed. The reporter adds a nota, that this was reverſed chiefly on this ground, that debts may ariſe ſeven years after, and ſo the eſtate ſhould ſurvive for the poſſibility of advantage to the creditors.——— Equ. Abr. 242. (C) pl. 1. S. C. abridged from Chan. Caſes, 239. But the author (Mr. Foley as is ſtrongly ſuppoſed) makes a quære in the margin; for that the reſolutions ſince have been otherwiſe in equity; and it ſeems well ſettled, that the ſurvivor ſhall have the whole by law; as where a man deviſed goods to A. and B. and the executor aſſented to the legacy, and A. died, and his executor ſued in the ſpiritual court for A.'s ſhare, there being no ſurvivorſhip in ſuch caſe, by the eccleſiaſtical law; whereupon B. ſued a prohibition, and declared; and upon demurrer and argument, it was adjudged the prohibition ſhould ſtand; for by the aſſent of the executor, the intereſt was veſted in the legatees, and became a chattel in them, governable by the rules of the common law. Mich. 29 Car. 2. between Baſtard and Stukely. 2 Lev. 209. and ſays, ſee 1 Lev. 164. 2 Jo. 161. 130.

18. A co-executor was decreed to *perform an award* 12 *years after the award made,* and though the other co-executor made no demand in all that time; but tranſactions were between them. Fin. Rep. 384. Trin. 30 Car. 2. Sweet v. Hole.

19. They are to be conſidered as jointenants where ſurvivorſhip ſhall take place, as well in caſes of *chattels* as in caſes of inheritance. Equ. Abr. 243. pl. 3. Trin. 1729. at the Rolls. Cray v. Willis. S.P decreed accordingly at the Rolls, on time taken to conſider of the caſe, and citing moſt of the authorities both out of the civil and common law. Equ. Abr. 243. pl. 4. Trin. 1730. in the caſe of Hunt v. Berkley.

But if teſtator deviſes to one of his executors the reſiduum after ſuch debts and legacies paid, there after payment ſuch executor may take the goods and maintain treſpaſs againſt the other co-executor if he takes them from him, and conſequently detinue for keeping or detaining them. But this is as legatee, his own aſſent perfecting the legacy. Went. Off. Ex. 99.

## (A. b. 3) What one may do without the other.

### And where one is an Infant.

Br. Executor, pl 66. cites S. C.

1. DEBT ſhall be brought *by one executor only, where there are three executors*, and the *plaintiff only ſold the goods of the teſtator* for a certain ſum; for it is of his own contract only; *but of debt due to the teſtator, all ought to join.* Br. Dette, pl. 81. cites 38 E. 3. 9.

Br. Conſcience, pl. 7. cites S. C.

2. If one executor will *releaſe a debt* without the conſent of his co-partner, *whereby the will cannot be performed*, the releaſor and the releaſee ſhall be ordered therefore in Chancery; by the Chancellor againſt the opinion of Fineux. Cary's Rep. 20. cites 4 H. 7. 4.

Co. Litt. 113. a. ſays, that though the letter of the law extends only where executors have a power to ſell, yet this being a beneficial law it is by conſtruction extended where lands are deviſed to executors to be ſold. Yet in neither of thoſe caſes, albeit one refuſes, can the other make ſale to him that refuſed, becauſe he is party and privy to the laſt will, and remains executor ſtill. But Ld. Coke ſays, that his advice to them that make ſuch deviſes by will is to make it as certain as they can, as that the ſale be made by his executors, or the ſurvivors or ſurvivor of them, if his meaning be ſo, or by ſuch or ſo many of them as take upon them the probate of the will or the like. And it is better to give them an authority than an eſtate, unleſs his meaning is that they ſhould take the profits of his lands in the mean time, and then it is neceſſary that he deviſeth, that the mean profits till the ſale ſhall be aſſets in their hands; for otherwiſe they ſhall not be ſo.

3. 21 *H.* 8. *cap.* 4. *ſ.* 1. *Where part of the executors of any perſon making a will of lands to be ſold by his executors, refuſe to take upon them the adminiſtration, all bargains and ſales of ſuch lands, made by ſuch only of the executors that accept ſuch adminiſtration, ſhall be as effectual as if all the executors had joined in the making of the bargain and ſale.*

*S.* 2. *Provided that this act ſhall not give power to any executors to bargain or put to ſale any hereditaments, otherwiſe than by the common law.*

A. ſeiſed of the manor of D, deviſed the ſame to J. S. and three others, and their heirs, to the intent the deviſees ſhould ſell it for the beſt profit, and convert the money to the performance of his will, and makes them his executors, and dies. One of them refuſes to ſell, but the other three ſell, living the fourth. Adjudged that the ſale was good by the three, either by the common law or by the ſtatute 21 H. 8. and the making them his executors is as much as if he had deviſed that the executors ſhould ſell, and in ſuch caſe the ſale by the three without the fourth is good. Cro. E. 80. pl. 43. Mich. 29 & 30 Eliz. Bonefant v. Greenfield. ——— Le. 60. pl. 78. S. C. ——— Godb. 77. pl. 92. S. C. adjornatur.

4. *Three executors, one an infant*, they muſt ſue by attorney, becauſe they make all but one perſon, and ſue in auter droit. Cro. E. 378. in a nota in pl. 28. Hill. 37 Eliz. C. B. in the caſe of Rutland (Counteſs) v. Rutland (Counteſs) ſays, it was reſolved that it was good.

Cro. E. 478. pl. 8. S. C. the Court ſeemed to be divided. But Ibid. 496. S. C. adjudged by three juſtices, contra Fenner for the defendant.

5. There were two executors, and the one of them gave a bond due to teſtator, to a creditor of his own, in payment of his own debt, and dies; adjudged, that *detinue* lies not by the *ſurvivors*. Mo. 422. pl. 589. Mich. 37 & 38 Eliz. Kelſick v. Nicholſon.

6. The

6. The *waving of one* executor is good; and though that he might after adminiſter, as the book of 21 E. 4. is, for that the intereſt of his companion prefers his authority, where there are two or more. But if there be but one executor, and he refuſeth, and the ordinary grants adminiſtration to another, he cannot then adminiſter again. 2 Brownl. 58. Agreed by all the juſtices, in the caſe of Bedel v. Bedel. Hill. 8 Jac. C. B.

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12. Infant executor ought to *ſue* by guardian; Twiſden J. ſays it has been ſo adjudged. Vent. 54. Hill. 20 & 21 Car. 2. B. R. Foxwiſt v. Tremain.

2 Saund. 213. S. C. ——Show. 167. Arg. S. P. and that he ought to be ſued by guardian, or elſe it is error, cites Sty. 318. Wild v. Rumney, and adjudged accordingly, Ibid. 170. Coan v. Bowles. ——Though an infant ſole executor cannot ſue per attornatum, yet if he does ſue per attornatum and recovers, his appearance is no error; but it is otherwiſe where he is condemned in the action. Per Holt Ch. J. Carth. 123. Paſch. 2 W. & M. in caſe of Coan v. Bowles.

13. And though above 17, he ought to ſue by guardian or by prochein amy. Vent. 103. Mich. 22 Car. 2. B. R. in caſe of Foxwiſt v. Tremain, cites Peyton v. Dorce.

14. Four executors; two of them are under *age*; quære, whether they ſhall ſue by *attorney?* It ſeems thoſe of age may make an attorney for thoſe under age. Vent. 40. Trin. 21 Car. 2. B. R. Foxwiſt v. Tremain.

Ibid. 102. Mich. 22 Car. 2. S. C. adjudged by Rainsford and Morton J. contra Twiſden, abſente the Ch. Juſtice. ——Raym. 198. S. C. but no opinion. —— Mod. 296. S. C. Moreton and Rainsford were of opinion contra Twiſden, but ſays that afterwards the ſuit was compounded. ——Lev. 299. adjudged accordingly that the defendant anſwer over. —Sid. 499. pl. 13. S. C. adjudged accordingly. The reporter ſays nota, it was agreed by all that if one executor be of full age, and another within 17 years, that they ſhall join in action, becauſe both are executors quoad eſſe, though they are not quoad executionem. ——2 Saund. 212, 213. S. C. reports it to be adjudged by Moreton, Rainsford and Twiſden (the Chief J. being ſick), for the plaintiff; but Twiſden ſaid that his opinion was, that the infant executor cannot ſue by attorney, but ſaid that the opinion of the Chief Juſtice and the other juſtices was to the contrary. ——Where an infant is executor alone he cannot ſue per attornatum, for if he do he ſhall be amerced pro falſo clamore; but where he is joined with others of full age it is otherwiſe, becauſe thoſe of full age have authority to diſpoſe all their aſſets without the aſſent of the infant, and this is the reaſon of the difference between an infant plaintiff and defendant in 2 Saund. 212. [Mich. 22 Car. 2. Foxwith v. Tremain.] Per Holt Ch. J. Carth. 123. Paſch. 2 W. 3. in B. R. in caſe of Coan v. Bowles. ——2 Saund. 212. denied to be law, and held that infant executor can neither ſue nor be ſued by attorney. Gibb. 2. Mich. 1 Geo. 2. B. R. in caſe of Keniſton v. Friſkobaldi.

15. There were *two executors*, and *one* of them *an infant*; they *both joined in an action*, which they brought *per attornatum*; it was objected that they could not ſue by attorney, becauſe an infant may not make a warrant of attorney; for the law preſumes that he is not able to inſtruct one; but it was adjudged, that ſince one of the executors was of full age, they might both ſue *per attornatum*, for both repreſent the perſon of the teſtator, and ſue in the right of another; and it ſeems unreaſonable that one of them ſhould ſue per attornatum, and the other by his guardian; but Twiſden was of another opinion, viz. that an infant executor cannot ſue per attornatum, becauſe he cannot make a warrant of attorney, and if he ſhould be nonſuit, he muſt be in miſericordia, which an infant ought not to be. 2 Saund. 207. 212. Mich. 22 Car. 2. Foxwiſt v. Tremaine.

Lev. 299. S. C. adjudged by Rainsford and Moreton, contra Twiſden, ægroto. —Vent. 102. S. C. adjudged accordingly. —Raym. 198. S. C. but S. P. does not appear. —— Sid. 449. pl. 13. S. C. & S. P. adjudged accordingly, but Twiſden fortiter e contra. ——Mod. 47. pl. 102. and 72. pl. 26. and 296.

206. pl. 40. S. C. & S. P. held accordingly; and Ibid. 299. says the suit was afterwards compounded. ——— Gibb. 1. Mich. 1 Geo. 2. B. R. Kenisston v. Friskobaldi, S. P. and per tot. Cur. the disability of an infant is adherent to his person; and the law regards the acts of an infant executor because he is liable to a devastavit; and they held that an infant may neither sue nor be sued as executor by attorney; that the case of Foxwith and Tremain, Lev. 299. 2 Saund. 212. was not law, and that Holt's opinion was always known to be the reverse of what is reported by Shower in the case of Coan v. Bowles; and the judgment was reversed.

D. 23. b. pl. 146.

16. Executors need not join, but may act severally if they will; *each may sell*, assign, or release the whole, without joining with the other; but otherwise of co-trustees. Per Cowper K. in affirmance of a decree from the Rolls. 2 Vern. 570. pl. 516. Hill. 1706. Murrell v. Cox and Pitt.

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Even though they are only executors in trust. Agreed Abr. Equ. Cases, 319.

17. Each executor has an *interest and power over the whole estate* of the testator; Arg. 10 Mod. 324. Austen v. Executors of Sir William Dodwell.

Nor can he sue by attorney, and Twisden denied the case of Lev. 209. Foxwist v. Tremain.

18. Infant *executor*, though *sued with others* of full age, cannot appear *by attorney*. Gibb. 1. pl. 1. Mich. 1 Geo. 2. B. R. Kenisston v. Friskobaldi. ——— The reason why the law will not allow of his prosecuting or defending his right by attorney is, that though the attorney should act contrary to his warrant, he is not answerable to him for it, whereas in such case he has remedy against his guardian, and likewise because he has not power by law to make an attorney. Gibb. 2. pl. 1. Mich. 1 Geo. 2. B. R. in case of Kennisston v. Friskobaldi.

## (A. b. 4) Joint Executors. Actions against them and Pleadings; and Judgment; how.

1. WHERE *guardian in chivalry makes two executors, and* dies, and the *one does waste*, writ of waste lies against him alone, without naming his co-executor. Thel. Dig. 47. lib. 5. cap. 12. s. 8. cites Hill. 3 E. 2. Waste, 3.

2. A writ of *dower* was maintained *against one as guardian, who had the ward as executor, without naming his co-executor, because he alone occupied the ward*, and that the writ was *not brought against him by name of executor*. Thel. Dig. 47. lib. 5. cap. 12. s. 3. cites Trin. 8 E. 3. 420.

3. It was held that a man may have writ of *debt against executor of the first testator, and the executor of the executor of the same testator jointly*. Thel. Dig. 47. lib. 5. cap. 12. s. 4. cites Trin. 19 E. 2. Executors, 117. and 15 H. 6. Executors, 12. and says it was held, Hill. 29 E. 3. 4. that the *executor of the executor ought* in such case *to be named, if he has the goods of the first testator in his hands*.

4. In writ of debt to be brought against executors, *it is sufficient to name those who administered only*. Thel. Dig. 47. lib. 5. cap. 12. s. 1. cites Mich. 17 E. 2. Brief, 822. and 24 E. 3. 21. and Pasch. 31 E. 3. Brief, 341. where writ of *detinue of charters* was maintained *against one* executor alone, without naming his co-executors, who administered, *because the charters were in his keeping only*; and that so agrees Hill. 39 E. 3. 6. 11 H. 4. 50.

5. Debt

5. Debt *againſt executor and executor of his co-executor*, and *counted upon a contract between him and the teſtator*, and becauſe the writ was brought againſt both, and he *did not ſhew ſpecially*, therefore the plaintiff took nothing by his writ. Br. Executor, pl. 26. cites 41 E. 3. 13.

6. In *writ* to be brought *againſt adminiſtrators*, they *ought all to be named to whom the adminiſtration was committed* by the ordinary, *and no other*. Thel. Dig. 47. lib. 5. cap. 13. ſ. 1. cites Mich. 38 E. 3. 24. Hill. 41 E. 3. 2. Paſch. 9 H. 5. 6. but ſays, it ſeems that the opinion of Mich. 8 H. 6. 2. is, that he *need not name him who has not adminiſtered*; which is not law as he believes. If adminiſtration be committed to five, and three only adminiſter, yet the action ſhall be brought againſt all; but it ſeems that the two may refuſe by plea. Br. Adminiſtrator, pl. 21. cites 9 H. 5. 5.

7. In writ *againſt two executors*, if the *one pleads fully adminiſtered*, and the *other that there is a co-executor not named*, &c. they ſhall not have both, but ſhall be compelled to join. Thel. Dig. 213. lib. 15. cap. 2. ſ. 6. cites Paſch. 7 H. 4. 12. [ 369 ]

8. But *one executor* was received to *plead variance between the writ and the ſpecialty*, and the *other ne unques executor, ne unques adminiſtered as executor*. Thel. Dig. 213. lib. 15. cap. 2. ſ. 6. cites Paſch. 11 H. 6. 42.

9. It was held that the writ may be brought againſt the executors of the firſt teſtator only, and that they ſhould have action of treſpaſs againſt the executor of their executor. Thel. Dig. 47. lib. 5. cap. 12. ſ. 5. cites 13 H. 6. and 20 H. 6. 27. Executor, 22.

10. *Where there is a true executor*, and another *who adminiſters de ſon tort* demeſne, the *writ may be brought againſt the true executor alone* without naming the other. Thel. Dig. 47. lib. 5. cap. 12. ſ. 5. cites 13 H. 6. and 20 H. 6. 27. Executor, 22. and ſays, that ſo ſeems the opinion of Trin. 2 H. 5. 8. to agree; *and* that it *may be againſt both*, cites 15 H. 6. Executors, 12.

11. Executors repreſent the eſtate of their teſtator, and are as one and the ſame perſon, therefore every one *ſeverally* ſhall not *have a plea which goes in abatement of the whole writ*; but Brook ſays there were but two juſtices. Br. Executor, pl. 93. cites 37 H. 6. 17.

12. Subpœna againſt executors, the one ſhall not anſwer without the other; the ſame law of feoffees in truſt. Br. Executor, pl. 136. cites 8 E. 4. 5, 6. S. C. cited Went. Off. Executors, 97. and ſays that this was taken to be out of the reach and intent of the ſtatute of 9 E. 3. 3.

13. Two executors; one of them is made defendant; he ſhall be *charged* no further than *for the goods that came to his own hands*. Toth. 150. cites 35 Eliz. Herbage v. Backſhaw.

14. If one executor will *confeſs an action* this ſhall bind the other; ſo if he will *releaſe* or *give away the goods* of the teſtator, this ſhall bind his companion. Cro. E. 318. pl. 5. Paſch. 36 Eliz. B. R. Harethorp v. Milforth. Went. Off. Ex. 98. if one executor grants his part of the teſtator's goods, all paſſes, and nothing is left to the other; for that each has the whole, and there are no parts or moieties between executors.

15. Debt

If one appears on the capias, and the other makes default, judgment ſhall be againſt both de bonis teſtatoris, and if error be brought both muſt join; per Holt Ch. J. 1 Salk. 312. Rouſe v. Etherington.

15. Debt againſt two executors only *one appears and confeſſes the action;* the judgment ſhall be againſt both of the goods of teſtator's in the hands of all the executors, and the damages of him that appeared only. Brownl. 53. Paſch. 6 Jac.

If one executor be ſued, if he pleads that there is another executor not ſued, he muſt plead that he did adminiſter. Went. Off. Ex. 95. Marg. cites 9 H. 6. 44.

16. In action againſt them they muſt *all be joined* and made defendants, or at leaſt ſo many of them *as do adminiſter.* Went. Off. Ex. 95.

17. They are all as one perſon, and therefore *cannot plead ſeveral pleas in abatement.* Went. Off. Ex. 95. Marg. cites 37 H. 6. 17. 39 H. 6. 44. 38 E. 3. 9. Br. Executor, 13. 20, 21.

[ 370 ] 18. If *one will plead one plea and the other another,* ſome ſay that that ſhall be received which is beſt, for the teſtator's eſtate. Went. Off. Ex. 98.

19. *Judgment* may be againſt that executor or adminiſtrator that hath aſſets, and nil capiat per billam againſt the other that hath fully adminiſtered. Sty. 148. Mich. 24 Car. in caſe of Gill v. Croſs, cites 7 Car. in Scacc. Rot. 1189. Nevil v. Greenwood.

20. *In debt on a bond all are named in the declaration, and but one only arreſted,* and for him H. appears as attorney and ſtrikes out the names of the other, becauſe he had no authority for them, and after pleads in abatement that there are other executors *not named in the writ,* which the Court ſet aſide as frivolous, and only to put off trial, and *ordered a common bail to be filed for all,* and pleaded in chief; but by Twiſden, the ſtatute of 9 E. 3. cap. 3. extends not to executors that come in by arreſt upon latitat, quod non fuit negatum. Keb. 743. pl. 32. Trin. 16 Car. 2. B. R. Lower executor's caſe.

21. The Court ex motione Wild conceived 9 E. 3. cap. 3. that the executors or adminiſtrators that come firſt by diſtreſs ſhall anſwer, *extends not to a latitat.* Keb. 843. pl. 34. Hill. 16 & 17 Car. 2. B. R. Livermoor's caſe.

22. *Two executors* were *poſſeſſed of a term for years rendering* rent; *the rent is arrear for four years ſince the death of the teſtator;* the plaintiff brings an action of *debt againſt* the defendant *(one of the executors) and declares, that he ſimul cum the other did occupy the term,* &c. The defendant *pleads nil debet,* and the iſſue is *found for the plaintiff.* It was moved in arreſt of judgment, that the plaintiff could not have judgment, becauſe by his own ſhewing there were two executors and he had ſued only one of them. It was anſwered by the Court, that now he comes too late, and hath pretermitted his time; for he might have pleaded it at firſt, and demanded judgment whether he ſhould anſwer, but now the jury hath found him a debtor modo & forma, and he hath loſt the

advantage. Freem. Rep. 6. pl. 5. Mich. 1670. Goodwin v. Wickins.

23. An executor who is defendant muſt ſay that the other executor did adminiſter; but otherwiſe where executor is plaintiff; per Hale Ch. J. 3 Keb. 63. pl. 54. Trin. 24 Car. 2. B. R. Bullington and Salter's caſe.

24. *Action againſt one executor* where there are more; *if that one executor doth not plead that matter in abatement, but pleads to the action, he ſhall never have the advantage of ſuch a plea afterwards;* Arg. Carth. 61. Trin. 1 W. & M. in B. R. Boſon v. Sandford.

25. By the ſtatute 9 E. 3. if debt be brought againſt divers executors, and one appears and the other makes default upon the grand diſtreſs, the Court may proceed againſt him that appears, and if the plaintiff recovers, judgment ſhall be againſt all the executors for the goods of the teſtator; and the 25 E. 3. cap. 17. which gives a capias in debt, has always been conſtrued within the equity of 9 E. 3. ſo that if there are *ſeveral executors defendants, and a cepi is returned as to one, and a non eſt inventus as to the reſt, the plaintiff ſhall proceed againſt him that appears, and ſhall have judgment againſt all;* for the default upon the capias is the ſame upon the grand diſtreſs. Thus the judgment being againſt all, *one only ought not to bring the writ of error,* for the judgment being ad grave damnum of all, and the coſts which are adjudged againſt him only that appeared are but an acceſſory to the principal judgment, which cannot be reverſed quoad them only; per Holt Ch. J. 1 Salk. 312. pl. 17. Paſch. 1 Ann. B. R. Rouſe v. Etherington.

2 Ld. Raym. Rep. 870. S. C. in totidem verbis, but adds that the writ of error was abated.

## (A. b. 5) Joint-Executors. [371]

### In what Caſes one ſhall anſwer alone on the Default of the other.

1. 9 *E.* 3. *ſtat.* 1. *cap.* 3. *ſ.* 1. ENACTS, that *in a writ of debt brought againſt divers executors, the ſame executors, nor any of them, ſhall have but one eſſoign before appearance, that is to ſay, at the ſummons or attachment, nor after appearance, they ſhall have but one eſſoin, as the teſtator ſhould have had, ſo that all the executors do preſent the perſon of the teſtator as one perſon.*

*S.* 2. *And though the ſheriff do anſwer at the ſummons, that ſome of them have nothing whereby he may be ſummoned, yet there ſhall be an attachment awarded upon him.*

*S.* 3. *And if the ſheriff anſwer that he hath nothing whereby he may be attached, the great diſtreſs ſhall be awarded, ſo that at the great diſtreſs returned upon them, he or they that do firſt appear in the court ſhall anſwer.*

Debt againſt two adminiſtrators, proceſs continued till to the diſtreſs, and the one appeared, and the other made default, and notwithſtanding that the ſtatute ſays only that executor, &c. yet adminiſtrators are taken by the equity, and therefore he ſhall anſwer in the abſence of his companion; and ſo was the opinion of the Court. Br. Reſpondre, pl. 1. cites 3 H. 6. 14.

Where

Where a man brings debt againſt executors or adminiſtrators in the debet and detinet, he who firſt comes by diſtreſs ſhall not be compelled to anſwer by reaſon of this word (debet), which cannot be intended as againſt executors, nor where it is brought in the detinet as it ought to be. Br. Reſpondre, pl. 10. cites 11 H. 4. 56.

And if a feme covert and her baron and others are defendants, as executors or adminiſtrators, and ſhe comes without her baron, ſhe ſhall not be compelled to anſwer without her baron notwithſtanding this ſtatute. Ibid. ——— Br. Adminiſtrator, pl. 17. cites S. C. ——— Br. Executors, pl. 54. cites 11 H. 4. 56. S. C.

Debt againſt three executors who made default, and pone iſſued

*S. 4. And although ſome of them have appeared in the court, and make default at the day that the great diſtreſs is returned upon the other, yet nevertheleſs he or they ſhall be put to anſwer that firſt appeared at the great diſtreſs returned.*

againſt the one who was returned ſummoned, and did not come; and capias was awarded againſt three who were returned nihil, and at the day the one in the capias appeared, and three made default, and yet he was compelled to anſwer; for at common law the one executor ſhould not anſwer if all did not come, or that the proceſs be determined againſt ſome of them, and the ſtatute wills that he who firſt comes by diſtreſs ſhall anſwer, and therefore the ſtatute is put in ure, that he who comes at the firſt capias ſhall anſwer; quod nota by award; ſo it ſeems that this word diſtreſs is taken there as a coercion; for a man may be compelled as well by arreſt by capias as by diſtreſs; quod nota. Br. Reſpondre, pl. 22. cites 4 H. 6. 14.

*S. 5. And in caſe the judgment paſs for the plaintiff, he ſhall have his judgment and execution againſt them that have pleaded, according to the law heretofore uſed, and againſt all others named in the writ, of the goods of the teſtator, as well as if they had all pleaded.*

*S. 6. And it is to be underſtood, that if any in ſuch caſe will ſue according to the law that hath been uſed heretofore, he may freely do it notwithſtanding this ſtatute.*

2. *Detinue* was brought by a feme againſt the executors of her baron of the moiety of his goods by the cuſtom, and well, and the *one executor appeared alone*, and was awarded to anſwer by the
[372] ſtatute 9 E. 3. cap. 13. and the ſtatute ſays, that the executor who firſt comes in debt ſhall anſwer, and the *other actions brought as executor are taken by the equity of the ſtatute.* Br. Executor, pl. 128. cites 17 E. 3. 17.

3. *Audita querela* againſt two executors; the *one made default* and the *other was compelled to anſwer alone*, for the writ is in nature of a writ of treſpaſs, and the plaintiff ſhall recover damages for execution ſued againſt him not rightfully if it be [found]. Br. Executor, pl. 42. cites 2 H. 4. 17.

4. *Audita querela againſt two executors who ſued execution upon a ſtatute merchant made to their teſtator contra factum teſtatoris; the one came at the grand diſtreſs and prayed idem dies till the other came;* & non allocatur; but was compelled to anſwer though the ſtatute of executors in this caſe be in writ of debt, and this by the equity; quod nota. Br. Executor, pl. 48. cites 7 H. 4. 15.

5. In debt; per Hank. *pluries capias in debt* is *returned againſt three*, and *exigent iſſues againſt two, and pluries capias againſt the third*, there if the one appears at the exigent, and no exigent is returned, yet he ſhall anſwer; becauſe the defendants are executors, but he ſhall be diſcharged of the mainpriſe, becauſe the exigent ſhall be adjudged as none, inaſmuch as the proceſs iſſued ill. Br. Exigent, pl. 20. cites 12 H. 4. 17, 18.

6. Where

6. Where *four executors were impleaded*, and *three appeared*, and the *fourth made default*, the three were compelled to anſwer at the diſtreſs where the 4th made default, and was returned nihil, &c. which was againſt the opinion of Hill, and ſeveral, &c. Br. Executor, pl. 64. cites 14 H. 4. 23, 24. Br. Charters de Terre, pl. 21. cites 14 H. 4. 23, 24. 27. and 21 H. 6. 1.

S. C. and it is ſaid there that 12 H. 4. is contra; and ſee 41 E. 3. 30, 31. becauſe the one executor was omitted in the writ, the plaintiff durſt not proceed but was nonſuit, which agrees with this caſe; but Brooke ſays it does not much appear there that this was ex neceſſitate.

7. The ſtatute 9 E. 3. cap. 5. is, *that that executor who firſt comes by diſtreſs ſhall anſwer*, yet it is put in uſe that he who comes by capias ſhall anſwer; quod nota; and this ſeems to be by equity. Br. Parliament, pl. 24. cites 4 H. 6. 14.

8. Where all the executors die, and the *ſurvivor has executors*, where they are impleaded, he who firſt comes by diſtreſs ſhall anſwer as well as if they were the firſt executors; quod nota; for this is a like miſchief. Br. Executor, pl. 99. cites 39 H. 6. 45.

9. *Debt againſt* three executors, and *at the ſummons two came* and the *third not*, and it was agreed there that the other two ſhall not anſwer without the third; for the *ſtatute is intended at the third writ, be it by diſtreſs or capias*, though the ſtatute ſays that the executor who firſt comes by diſtreſs ſhall anſwer, for capias is by compulſion as well as diſtreſs, therefore ſhall anſwer there by the equity of the ſtatute; contra of him who comes *by ſummons*, by which proceſs was made againſt him, and idem dies given to them who appeared; quod nota bene. Br. Executor, pl. 106. cites 1 E. 4. 1.

10. In *rationabile parte bonorum* againſt executors he who firſt comes by diſtreſs ſhall anſwer; for they are charged there as executors. Br. Executor, pl. 135. cites 7 E. 4. 20, 21. S. P. as in debt or detinue; for where ne unques executor, ne unques adminiſtered as executor is a good plea, as here, there executor who firſt comes by diſtreſs ſhall anſwer. Br. Reſpondre, pl. 35. cites 7 E. 4. 29.

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11. *Subpœna againſt executors*, the one ſhall not anſwer without the other; per opinionem; and the ſame law of feoffees upon truſt. Br. Executor, pl. 136. cites 8 E. 4. 5, 6. S. P. but in attachment againſt two clerks of the Chancery as executors, if the one comes he ſhall anſwer alone by the ſtatute that he who firſt comes ſhall anſwer, for the attachment is as a ſuit at the common law; quære of ſubpœna. Br. Conſcience, pl. 15. cites S. C.

## (A. b. 6) Joint-Executors. Actions by them and Pleadings.

1. IF a man makes two executors and dies, and the *one refuſes before the ordinary*, and the *other proves the teſtament*, yet *action ſhall be brought in the name of both*. Br. Executor, pl. 9. cites 3 H. 6. 6, 7. per Cott. S. P. Ibid. pl. 168. cites 2 R. 3. 20.

2. The confeſſion, pleading, or default of one executor will not charge his companion; ſo a ſale by one is good, for as to the goods If two executors are ſued jointly, and one

confeſſes the action, this ſhall bind him and his companion alſo for ſo much as he hath in his hands. 2 Brownl. 186. —— But a confeſſion by an executor de ſon tort ſhall not prejudice the rightful executor.

goods of the teſtator, they are but as one perſon, and ſuch act of one chargeth both only as to the teſtator's goods, but not their own proper goods. As one executor may confeſs, ſo he may releaſe, &c. But if one be nonſuited, yet the other may ſue again. Br. Executor, pl. 77. cites 21 H. 6. 45.

3. If two executors have judgment, and the one prays a capias, and the other a fieri facias, the capias ſhall be awarded as beſt for the teſtator; per Hobart Ch. J. Hob. 61. in caſe of Foſter v. Jackſon, cites 7 Hen. 6. 6. per Cottimore.

4. *Account by* two executors againſt B. and have judgment quod computet. *One dies;* yet the writ ſhall not *abate*, but the ſurvivor ſhall have a ſpecial ſci. fa. ad computandum in his own name, reciting that the other is dead. Noy, 68. Anon.

5. Two executors and *joint in the bill* ſhall be *ſevered upon hearing*. Toth. 151. cites Mich. 8 Car. Moore v.

7 Mod. 39. S. C. accordingly.

6. *Two executors ſued and declared as ſuch, and that they proved the will; but upon ſetting forth the probate, it appeared that the will was proved by one only.* The defendant pleaded this in abatement, but a reſpondeas ouſter was awarded, becauſe they both have a right, and he that did not prove may come in when he pleaſes, but cannot refuſe during the life of him that did prove. 1 Salk. 3. pl. 6. Paſch. 1 Ann. B. R. Brookes v. Stroud.

7. If one of them in action brought by them is *ſevered*, the other ſhall go on. Far. 39. Trin. 1 Ann. B. R. Brooks v. Stroud.

[ 374 ] (A. b. 7) Joinder in Action by and againſt Executors, &c. In what Caſes; and of Summons and Severance.

1. A Writ of *debt* brought *by executor, and executor of executors*, was adjudged good. Thel. Dig. 31. lib. 2. cap. 11. ſ. 1. cites Paſch. 18 E. 2. Executors, 115. and that ſo it is agreed Mich. 7 E. 3. 348. But ſays it was ſaid in both the books that *the firſt executor who ſurvived might have action alone without the other.*

2. *But it* was held *clearly that they cannot join.* Thel. Dig. 31. lib. 2. cap. 11. ſ. 2. cites Trin. 19 E. 2. Executors, 117. And that ſo agrees Mich. 29 E. 3. 64. and Hill. 38 E. 3. 8. and Paſch. 28 E. 3. 92. And that the clear opinion 39 H. 6. 48. that *the firſt executor ſurviving ſhall have action of treſpaſs againſt the executors of executors, &c.* and 13 H. 6. Executors, 22. *Notwithſtanding that ſome who are named executors in the teſtament refuſe* the adminiſtration before the ordinary, yet they ſhall be all named in a writ to be ſued by them. Mich. 15 E. 3. Executors, 80. and ſo agrees Mich. 41 E. 3. 22. & 35 H. 6. 36. and Paſch. 9 H. 5. 6. Trin. 4 E. 3. 157.

3. Where

3. Where a *recognizance was made to two, and both die*, and the executors of both ſue a ſcire facias, &c. Hill ſaid, that by the law *the executors of him who ſurvived ought to have the ſuit alone.* Thel. Dig. 31. lib. 2. cap. 11. ſ. 3. cites Mich. 15 E. 3. Executors, 81. and that ſo agrees Hill. 38 E. 3. 8. where one was bailiff of a wood to two tenants in common, the writ of account was maintained for the executor of him who ſurvived alone.

4. Where *one of the executors ſells the goods of the teſtator*, he alone may maintain writ of debt upon this ſale without his co-executor. Thel. Dig. 31. lib. 2. cap. 11. ſ. 4. cites Paſch. 38 E. 3. 10.

5. *Detinue of charters againſt a feme*, and *counted that they were delivered to the baron of the feme who died, and they came to the hands of the feme*; the *defendant pleaded to the writ, becauſe the baron made her and one J. his executors who is in full life not named.* Per Belk. this action is brought by reaſon of the poſſeſſion, &c. and after the plaintiff confeſſed the exception, by which *defendant* prayed that the writ abate, but becauſe he was an *infant* he was *permitted to be nonſuited.* Br. Detinue de biens, pl. 12. cites 41 E. 3. 30.

6. *Treſpaſs* was maintained *by two, and by the name of executors of goods of the teſtator taken out of their poſſeſſion*, becauſe the *third executor did not adminiſter*; quære inde, for it ſeems that of goods taken out of their poſſeſſion they need not join in action. Br. Executors, pl. 31. cites 42 E. 3. 26.

7. A man *bailed goods to W. S. who made two executors* and died; *the one executor got poſſeſſion*, and *detinue was brought againſt him only*, and well by award; for *nothing ſhall charge him but the poſſeſſion*, and not the bailment nor the executorſhip. Br. Executor, pl. 92. cites 39 E. 3. 5.

Br. Detinue de biens, pl. 39. cites 39 E. 3. 5. S. C. —— Detinue of charters lies only againſt that executor who has the poſſeſſion, and not againſt all. Br. Executor, pl. 145. cites 43 E. 3. 24. and Fitzh. Brief, 341.

8. In ſcire facias where a man makes *two executors*, and *the one refuſes before the ordinary*, and the *other proves the teſtament*, there the other is executor alſo, and he may adminiſter when he will, and he who adminiſters ſhall have action without the other who refuſed; per * Candiſh, quod non negatur; and it is taken for law at this day. Br. Executor, pl. 38. cites 49 E. 3. 17.

Thel. Dig. 31. lib. 2. cap. 11. ſ. 5. S. P. cites Mich. 42 E. 3. 26. and that ſo agrees Mich. 12 R. 2. Executors, 75. —— But the opinion of Newton is to the contrary notwithſtanding that he name himſelf executor in the writ. Thel. Dig. 31. lib. 2. cap. 11. ſ. 6. cites Paſch. 19 H. 6. 65. And ſays that to this ſeems to agree the opinion of Keble, Hill. 16 H. 7. 4.

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9. If *three are executors and the one has the poſſeſſion*, action lies againſt him alone. Br. Detinue de biens, pl. 12. cites 11 H. 4. 46.

10. Where there *is one executor and another adminiſters with him*, yet the creditor is not bound to bring his action, but againſt the executor only; but he may implead both if he will. Per Coteſmore. Br. Executor, pl. 160. cites 10 H. 6. 26.

11. It was held, that where *in account brought by two executors* the *one was ſevered*, and the *other purſued the whole*, in which ſuit the

the *defendant was adjudged to account*, that the *acquittance of him who was severed shall bar the other of the whole.* Thel. Dig. 31. lib. 2. cap. 11. ſ. 7. cites Paſch. 48 E. 3. 14. And that ſo it is agreed, Paſch. 9 H. 6. 11. where it was ſaid that if two executors are, and the *one aſſigns auditors*, &c. *he* who aſſigns the auditors *ſhall not have writ of debt alone for the arrearages* of accounts without his companion.

But by ſeveral where the one executor confeſſes the action the other ſhall

12. Debt *againſt two executors upon an obligation of their teſtator*, the *one pleaded plene adminiſtravit*, and the *other not the deed of his teſtator*; and the beſt opinion was, that they *may ſever in pleas*, *contra* it is ſaid elſewhere *in dilatories*. Br. Executor, pl. 110. cites 7 E. 4. 8.

not plead non eſt factum; for where the one confeſſes, all are condemned, and judgment ſhall be againſt all of the goods of the deceaſed, and of the damages againſt him who confeſſed de bonis propriis ſi non ſunt bona mortui; viz. where one executor ſhall anſwer alone without his companion. Ibid.

13. Where *one makes his feme and another his executors and dies*, and his *feme takes baron, and* the feme *dies*, the *baron and the other executor ſhall not join in the writ of treſpaſs* of the goods of the teſtator taken out of their poſſeſſion. Thel. Dig. 32. lib. 2. cap. 11. ſ. 8. cites Paſch. 21 E. 4. 4. & 20 E. 4. 17.

14. The plaintiff ought always to acknowledge of his part *all the executors*; but where a *ſtranger* brings an *action againſt executors*, it is ſufficient for him to name thoſe that adminiſtered in fact, and not others that did not intermeddle with the adminiſtration. Thel. Dig. Ibid. pl. 9. Hill. 16 H. 7. 4. pl. 1.

15. *But upon an obligation* made *to one B. and to an abbot*, if *B. dies*, now *his executors and the abbot ſhall join* in action of debt. Thel. Dig. 32. lib. 2. cap. 11. ſ. 9. cites Fitzh. Nat. Brev. Tit. Br. de Debito.

16. If *one executor only ſells goods* of teſtator, he alone may maintain an action of debt for the money. Went. Off. Ex. 104.

17. Where one *executor refuſed*, yet in action brought by the other he muſt join him that refuſed. 9 Rep. 37. Trin. 42 Eliz. Henſloe's caſe.

18. *Two executors, one an infant*, the executor of full age took out adminiſtration during the minority of the infant, and then brought an action in his own name only; the action abated. Brownl. 101. Trin. 6 Jac. Smith v. Smith.

Or that executor only who had the goods. Br. Treſpaſs, pl. 395. cites 42 E. 3. 26.

19. If *goods are taken from one*, all may maintain an action of treſpaſs; for in ſuch caſe the poſſeſſion of one is the poſſeſſion of all, though it is otherwiſe where it is to charge another executor's own goods. Went. Off. Ex. 100.

——One only may maintain the action. Went. Off. Ex. 104.

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20. Error of a judgment in debt. *Debt* was brought *by ſix executors*, and after *three of them being ſummoned and ſevered, the three others bring debt upon an obligation* made to the teſtator; the defendant *pleaded non eſt factum*, and it was *found againſt him, and judgment for the plaintiffs; error was brought and aſſigned, becauſe there is not any mention therein of thoſe that ſevered*, for they being always executors

cutors ought to be named in the judgment; the three prothonotaries certified that the courſe was to give judgment for thoſe only that proſecuted, and *reſolved*, that it was *no cauſe of error*, for the executors which are ſevered, peradventure never proved the will, and it may be they never will prove it nor adminiſter The judgment was affirmed. Cro. C. 420. pl. 11. Trin. 11. B. R. Price v. Parkhurſt.

21. In *error in a judgment in debt againſt three executors, one* of them *appeared upon the ſummons and confeſſed the action, and judgment was given quod recuperet debitum againſt the three* executors, *and that he ſhould have execution againſt them de bonis teſtatoris in their hands ſi tantum, and damages de bonis propriis againſt him who appeared, and miſericordia againſt them all.* The error aſſigned was, becauſe the appearance was upon the ſummons and not upon the diſtreſs, and therefore was out of the ſtatute of 9 E. 3. cap. 3. Secondly, Becauſe it is miſericordia againſt three, whereas two of them never appeared, and againſt him who appeared no miſericordia ought to be, becauſe he came in upon the day of ſummons, ſo it was reſolved that he who was taken in execution ſhould be diſcharged. Cro. C. 564. pl. 9. Mich. 15 Car. B. R. Proctor v. Chamberlain.

22. A. makes two *executors, one is an infant*, he of age ſues alone, and good. Lev. 181. Paſch. 18 Car. 2. B. R. Hatton v. Maſcal. Ravm. 198. S. C. where there are ſeveral executors, and one or more under age, and the reſt of full age, all muſt join in an action. Per Twiſden. Mod. 47. Hill. 21 & 22 Car. 2. B. R. in caſe of Fox v. Tremain.

24. A ſcire facias was brought *by two executors, reciting that there was a third, but within age;* reſolved, that all muſt join. Arg. Mod. 47. pl. 102. Hill. 21 & 22 Car. 2. cites Hutton v. Aſkew.

25. *Executor of full age only* who proved the will, brought action of debt for arrears of rent, and good. 1 Lev. 181. cites 31 Car. 2. B. R. Colborn v. Wright. 2 Lev. 239. S. C. ſtates it that the executor of full age proved the will, and had adminiſtration durante minoritate of the infant and ſued alone. —— 2 Jo. 119. S. C. but the Court diſapproved the conteſt of the defendant, who was a pleader at the bar againſt a manifeſt duty, and ſo he agreed the cauſe as it ſeems.

26. [Though where there are *ſeveral reſiduary legatees* they muſt all join in an action yet] where the ſhare of each (there being in all 16) was left to the diſcretion of the executor, as he without compulſion at law ſhould declare; the executor declared what the ſum of the reſidue was, and that he had paid all the legatees but one, yet he alone ſued for an account in Chancery without the others joining, and was relieved. 2 Ch. Caſes, 198. Trin. 26 Car. 2. Gibbons v. Dawley.

## (A. b. 8) Joint Executor. Survivor.

### Where Survivors ſhall have the Surplus, &c. and join or be joined in Actions with Executor, &c. of the deceaſed Co-Executor.

1. NOTE, it was ſaid that where *two are executors*, and the *one makes his executor and dies, that by way of demand, the executor who ſurvives ſhall have the action alone* by ſurvivor, and the executor of the other executor ſhall not join with him by demand. Br. Executors, pl. 29. cites 41 E. 3. 13. 22.

2. *But* they *ſhall be joined with the other in action againſt him*; for it may be that he has of the goods of the firſt teſtator. Ibid.

3. *But* Brook ſays it ſeems that all is one, and that he ſhall not be joined with the other in any of the caſes; quære this diverſity. Ibid. and cites 21 E. 4. 22. 23. 10 H. 6. 26. and 39 H. 6. 45. that the *ſurvivor ſhall neither ſue nor be ſued but as executor de ſon tort demeſne*.

4. *Debt againſt executors and executors of executor*, and per the juſtices, it *does not lie againſt both*; for they cannot join in action; but the ſurvivor executor ſhall have action alone, and the like action ſhall be brought againſt him. Br. Executors, pl. 99. cites 39 H. 6. 45.

5. *And if the executor of the executer has* any of the *goods of the firſt teſtator*, the *executor who ſurvives ſhall have action againſt him*, and yet a man may have action againſt executor de droit, and executor who adminiſters de ſon tort demeſne; for this is his own act and tort, and he is charged de ſon tort; but here the plaintiff would join both together by the law, which cannot be; for he *cannot charge them jointly* by the law; quod nota. Ibid.

6. A. and B. were made executors *to the uſe of children*; B. having gotten a great part of the teſtator's eſtate into his hands *deviſes divers legacies to ſtrangers*, and makes C. the defendant, (his ſon,) executor, and dies; C. by anſwer confeſſeth his father had divers goods of the firſt teſtator's in his hands, but that he had not goods ſufficient more than would ſatisfy the legacies given by his father; therefore ordered that C. ſhall firſt pay to the plaintiff the goods which were the firſt teſtator's, and ſo much of his eſtate as came to his father's hands. Cary's Rep. 123. cites 21 & 22 Eliz. Wray v. Sapcote.

7. A. made B. and C. *executors and reſiduary legatees*, and died. B. died. The queſtion was between C. and the executors of B. whether this being a matter legatory and ſuable in the ſpiritual court, (where ſurvivorſhip would not be allowed,) C. ſhould be liable to account with the executors of B. And after time taken to conſider of it, the Maſter of the Rolls decreed that the ſurvivor ſhould take the whole. 2 Wms.'s Rep. 529. Trin. 1729. Cray v. Willis.

8. C.

8. G. Amhurſt by will *deviſes the reſiduum to defendant Selby, and to E. ux' B. and to C. ux' T. and makes them three executors*, the defendant *Selby only adminiſters*, and *before all the eſtate* of the teſtator was *got in and his debts paid, E. ux' B. dies; and then B. her huſband dies.* Quære, If the adminiſtrator of the huſband is intitled to the third part of the reſiduum of the teſtator's eſtate, or the adminiſtrator of E. the wife? Northey, attorney general, inſiſted that the defendant being the acting executor, his poſſeſſion of the goods and effects of the teſtator, is the poſſeſſion of the two [ 378 ] other executors, though they did not adminiſter, and that is an intereſt veſted in the wife, and conſequently ſhall go to the adminiſtratrix of the huſband. Per Cowper C. the reſiduum of the teſtator's eſtate is uncertain *until* his *eſtate is got in*, and his *debts paid, and thereby reduced to a certainty*, and before that *it cannot be ſaid to be actually veſted, but remains as a choſe en action, and therefore ſhall not go to the adminiſtratrix of the huſband, but* to the adminiſtrator *of the wife.* MS. Rep. Hill. 3 Geo. Canc. Amhurſt & al' v. Selby.

## (A. b. 9) Co-Executors. Actions by them, and Pleadings by Survivors, &c.

1. *ACCOUNT* brought *by four executors; defendant ſaid, that there were five executors, and the fifth has made his executors and died*, which executors are not named; & non allocatur; but the writ good by the ſurvivors only. Br. Executors, pl. 65. cites 38 E. 3. 7.

2. *Three executors brought action, two are ſummoned and ſevered*, and the *third recovered and died*; the other two ſhall have execution. Br. Executors, pl. 148. cites 11 R. 2. and Fitzh. Privilege, 2.

3. *Two executors* are, and the *one makes his executor and dies*, yet *debt lies againſt the executor who ſurvives only.* Br. Executor, pl. 160. cites 10 H. 6. 26.

4. *Debt by executors*, and *ſhewed teſtament, in which there was named two other executors* with the plaintiff; and per Moile J. in this caſe and in debt upon obligation the *plaintiff ought to ſurmiſe the death of the other two in his count*, and otherwiſe the writ ſhall abate, and e contra in formedon in remainder, but there the other party ought to ſay it for plea; for teſtament and obligation ſhall be ſhewn *without demand of the other party*; but in formedon in remainder the demandant is not bound to ſhew it unleſs the tenant demands it, quod nota diverſity, but becauſe it was counted of another term in which the teſtament was ſhewn, therefore the defendant was put over, by which he ſaid that there were two other executors alive not named in the writ. Br. Count, pl. 53. cites 36 H. 6. 16.

5. In *debt on bond* brought *by two ſurviving executors* the *defendant demurred* ſpecially to the declaration; and the principal

cauſe relied upon was, *that the plaintiffs had only alleged that the money had not been been paid to the teſtator in his life-time, nor to them nor one of them ſince his deceaſe.* It was now argued that this declaration was not certain enough, ſo as the plaintiffs could recover upon it; becauſe notwithſtanding any matter which they have alleged, the money might have been paid to the executor that is now dead. Serjeant Baynes on the other ſide anſwered that if it had, the money would in judgment of law have been paid to the ſurviving executors, as well as to the executor deceaſed; for a payment to one is a payment to all. *The Court*—this a matter to be further conſidered of. But a few days after *over-ruled the demurrer, and gave judgment for the plaintiff.* 2 Barnard. Rep. in B. R. 75. Mich. 5 Geo. 2. Meed v. Gibbons.

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## (B. b) Judgment.

### In what Caſes it ſhall be given againſt Executor and how.

[1. IN debt againſt executor, if defendant *pleads fully adminiſtered*, if *any aſſets are found* in his hands, though it be *not to the value* of the debt, yet the plaintiff ſhall have *judgment for all* his debts *de bonis teſtatoris.* 17 E. 3. 66. b. adjudged. 34 H. 6. 24. b. 8 Rep. 134. MA. SHIPLEY'S CASE, Tr. 12 Ja. B. R. adjudged between LEE AND RIDFORD.]

Tr. Executors, pl. 18. cites S. C.

[2. *But if it be found that he has nothing in his hands* the judgment ſhall be quod querens *nihil capiat per breve*, and he ſhall not have judgment of the debt, for he has waived this advantage by taking of the iſſue, and judgment is to be given upon verdict. 34 H. 6. 24. b. Contra 33 H. 6. 24. b. Contra 33 H. 6. 24. Curia.]

Hob. 178. pl. 206. S. C.

[3. In debt againſt an executor, if he *pleads plene adminiſtravit*, and *plaintiff replies that he has aſſets*, and *afterwards the defendant relicta verificatione cognovit actionem nec quin ipſe detinet*, upon which judgment ſhall be given againſt the defendant, but not that he has aſſets, for the acknowledgment naturally extends only to the declaration which is of the debt, and not of the aſſets; but if the defendant will confeſs more he may, but otherwiſe *the confeſſion is but a diſavowing of his plea* of plene adminiſtravit. Hob. 240. between BIRD AND CULMER.]

[4. If A. *recovers debts and damages againſt B.* and after B. dies, and then *a ſci. fa. to have execution is brought againſt four* perſons C., D., E., and F. *as executors of B.* and in the writ it is ſuppoſed that B. made the ſaid four perſons his executors, and *all four perſons appear and plead fully adminiſtered*, and the jury *find that C. has* 100*l. aſſets in his hands, and D.* 40*l. in his hands, and that E. and F. have no aſſets*, in this caſe the judgment ought to be againſt all the four perſons *to recover of the goods of the teſtator*, inaſmuch as they are all named executors, and they ſo take it upon themſelves

ſelves and plead accordingly. M. 9 Car. in the Exchequer Chamber, between * Nevel and Delabarr and others; per Cur. where the *judgment being to recover of the goods of the deceaſed* 100*l.* *againſt C. and* 40*l.* *againſt D. and that the other two ſhould go ſine die*, it was *held per Cur. to be erroneous, becauſe it was not againſt all*; but becauſe the writ of error to reverſe this and the firſt judgment was brought by C. and D. only with the other two, it was held by the Court that the writ of error ought to abate; but this judgment was after affirmed per Cur. and the writ adjudged good, inaſmuch as the two plaintiffs in the writ of error were only grieved by the judgment, and the judgment well given in B. R. Intratur Hill. 7 Car. B. R. Rot. 198.]

* Cro. C. 286. pl. 32. S. C. but S. P. does not appear. —See this caſe of Roll cited per Cur. 3 Mod. 135. in caſe of Hacket v. Herne.

[5. In an action of *debt againſt two executors* if they *plead ſeverally by ſeveral attorneys fully adminiſtered*, and the jury *find that one has aſſets, and the other has no aſſets*, the judgment *ſhall be ſolely againſt him who is found to have aſſets*, and that the other who has no aſſets ſhall go quit. Mich. 15 Car. in the Exchequer Chamber in writ of error of ſuch judgment in B. R. adjudged per Cur. and the firſt judgment affirmed accordingly. Intratur Tr. 14 Car. B. R. Rot. 1288. between Bellew and Juckleden.]

[6. In an action againſt *two executors*, if the *one is waived or outlawed, and the other appear upon the attachment* in Bank, the record being attachiatus eſt, and the plaintiff declares againſt him who appears who *pleads to iſſue*, and a *verdict* is for the plaintiff, the plaintiff ſhall have *judgment againſt both of the goods of the deceaſed, and if not, of damages of him who pleaded*, adjudged in a writ of error upon ſuch judgment in Bank, and the judgment affirmed accordingly. Tr. 16 Car. B. R. between Chamberlain and Nichols.]

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Fol. 930.

7. Error of a judgment in B. R. *againſt an executor for* 100*l.* *who pleaded riens enter mains, and found that he had* 50*l.* and *the judgment was quod recuperet debitum prædictum, et quod habeat executionem de bonis teſtatoris.* The error aſſigned was, becauſe the judgment was entire for 100*l.* inſtead of 50*l.* it was ſaid that the judgment ſhould be for the entire 100*l.* and that he might have ſcire facias upon it when more aſſets came to the hands of the executor; but the juſtices demanded more ancient precedents, and would adviſe. Cro. E. 592. pl. 32. Mich. 39 & 40 Eliz. in Cam. Scacc. Waterhouſe v. Woodſtreet.

8. In debt againſt an *executor* who *pleaded three ſeveral judgments for* 100*l.* *each judgment, and that he hath not beſides thoſe judgments* 20*l.* *in his hands*, &c. The plaintiff *replied, that thoſe judgments were ſatisfied and holden on foot by fraud*, &c. and *did demand judgment*, &c. and the defendant did *rejoin that the judgments were unpaid, and traverſed* without *that they were kept on foot by fraud*, and *the evidence for the firſt judgment was a decree before the council at York, which was paid; for the ſecond, a witneſs proved that ſome part of the money was behind, but the creditor did expect no more; for the third judgment no evidence was*, and direction to find for the plaintiff, and this rule given, that *if the defendant fail in proof, that any of the judgments appear to be ſatisfied, the iſſue is againſt him* though the

reſt were unſatisfied. Clayt. 124. pl. 220. March, 1647. before Germin J. Morris's caſe.

All. 37. Gawdy v. Congham. S. C. the error aſſigned was that judgment ſhould have been for ſo much only as was found in the defendant's hands, and that ſo are all the precedents which he had cauſed to be ſearched; but judgment was affirmed; for it is good either way, and in this Court *the Court is to give judgment for the whole*, according to Mary Shipley's caſe. 8 Rep. 154.

9. Judgment was given againſt an adminiſtrator *in an action of debt* brought againſt him in C. B. *upon fully adminiſtered pleaded*, and a writ of error was brought to reverſe the judgment. The *error aſſigned* was, *that judgment was given for the whole debt, whereas the verdict found that the defendant had aſſets only to diſcharge a part of it*; to this the Court ſaid, if it be found he have any aſſets, judgment muſt be given againſt him for the whole debt, upon his falſe plea, but if he have no aſſets, it is otherwiſe. Sty. 88. Hill. 23 Car. B. R. Gaudy v. Ingham.

10. If defendant do not or *will not exhibit an inventory*, it ſhall be taken pro confeſſo that he has aſſets; per Pemberton Ch. J. 2 Show. 163. pl. 152. Trin. 33 Car. 2. Anon.

11. *Debt upon an obligation of* 20*l.* againſt an executor who *pleads plene adminiſtravit, and aſſets being found of* 10*l.* the *plaintiff had judgment quod recuperet* 10*l.* whereas it *ought to have been a judgment for the whole, and execution only for* 10*l.* (unleſs it were returned that he had waſted) and then he might have had a ſcire facias when more aſſets came to the defendant's hands; and it was held to be erroneous. Freem. Rep. 351. pl. 441. Mich. 1673. Oxendem v. Hobdy.

[ 381 ] (B. b. 2) In what Caſes Scire Facias lies of Aſſets Quando acciderint.

1. IN *debt of* 10*l.* the *defendant pleaded plene adminiſtravit*, and it was *found that he had only* 4*l.* yet the judgment ſhall be that the plaintiff *recover all his debt*, and *nothing ſhall be put in execution but the* 4*l.* but if he *gets more goods of the teſtator after* by recovery or otherwiſe, then the plaintiff ſhall have *ſci. fa.* againſt them upon the ſame judgment; per Finch. quod nullus dedixit. Br. Executor, pl. 34. cites 46 E. 3. 9, 10.

2. Debt againſt *executors* who *pleaded plene adminiſtravit*, and *found for the defendant*; by which it was *awarded that the plaintiff take nothing by his writ*, and after the plaintiff came and *furniſed that aſſets is come after to the hands of the executors*, and prayed ſcire facias againſt them; and per Martyn, by the judgment the record is determined, and ſcire facias lies upon record which remains, and not upon record determined, and upon this matter the plaintiff may have the new writ of debt; quod nota, curia conceſſit. Br. Scire Facias, pl. 130. cites 4 H. 6. 4.

3. In debt againſt executors, or againſt the heir, who *pleaded plene adminiſtravit*, or riens per deſcent, and it is *found for them*, by which the plaintiff is barred, and *after aſſets came*, he may have

new

* *new action*, and ſhall not be barred by the firſt judgment; per Markham; quod nullus negavit. Br. Executors, pl. 70. cites 19 H. 6. 36, 37.

* S. P. But the plaintiff cannot have ſci. fa. for by the judgment the record is determined. Per Martin; quod tot. Cur. conceſſit; but Brook ſays, quære inde; for it ſeems that debt does not lie after the plaintiff is once barred. Br. Executor, pl. 85. cites 4 H. 6. 4.

4. If executors bar the plaintiff by riens enter mains, if they get goods after the plaintiff ſhall have ſci. fa. out of the ſame record by ſurmiſe to have execution of theſe goods; quod fuit conceſſum per omnes juſticiarios, &c. Br. Executor, pl. 18. cites 33 H. 6. 23, 24. See pl. 7.

5. In *debt* againſt executor *on bond for* 200*l.* defendant pleaded *plene adminiſtravit*, and the jury *found aſſets to* 172*l.* The plaintiff had *judgment to recover the intire debt and damages*, and coſts ſi, &c. This judgment was affirmed in the Exchequer-chamber; for upon the bar, which in effect is riens enter mains, the plaintiff might have prayed judgment immediately, for it is a confeſſion of the debt, but he cannot have execution till defendant has goods of the deceaſed; but the trial in this caſe is good direction to the ſheriff what to do as to the making execution. 8 Rep. 134. Paſch. 8 Jac. B. R. Mary Shipley's caſe.

6. It was reſolved in this caſe, that if debt brought againſt *an executor*, who pleads that he has fully adminiſtered, and it is *found* that he has *aſſets to* 40*l.* whereas the *debt is* 60*l.* that a judgment ſhall be given for the 60*l.* againſt the defendant; and upon that judgment, if more aſſets come after to the executor's hands, the plaintiff may have a ſcire facias. Godb. 178. pl. 250. Mich. 8 Jac. in C. B. Newman v. Babington.

7. When it is found in action againſt executor, that he has ſome aſſets, though of little value, ſo as he has *not fully adminiſtered*, the plaintiff ſhall have *judgment for the intire debt*; but he ſhall not have *execution*, but *of as much as is found*, and ſhall not be barred of the reſidue, † and if *more aſſets happen afterwards*, he may have a *ſci. fa.* to have execution thereof; but if it be found that he has fully adminiſtered, or if it be ſo pleaded or confeſſed, the judgment ſhall be againſt the plaintiff, and ſo are all the precedents. Cro. C. 373. pl. 7. Trin. 10 Car. B. R. in caſe of Dorcheſter v. Webb.

And ſo denied the law to be as in 8 Rep. 134. Mary Shipley's caſe. — But this part of Mary Shipley's caſe was held per Keyling Ch. J. and Rainsford and Moreton Juſtices to be good law, and adjudged accordingly in B. R. Twiſden J. afterwards agreeing thereto. Sid. 448. Noel v. Nelſon. — 2 Saund. 226. S. C.

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8. In debt againſt an executor who pleads *plene adminiſtravit*, which is found for him, and ſo the plaintiff is barred *pro tempore*, viz. until *aſſets* come afterwards to the defendant's hands, and then the plaintiff may have a *new action*. Heath's Max. 58. cites 19 H. 6. 27.

9. *So* in debt againſt an heir, who pleads *riens per deſcent*, or, in a *formedon*, pleads the warranty of his *anceſtor with aſſets*, and after the *aſſets* are recovered againſt him, he ſhall have a *new formedon*; and if he alien the *aſſets*, his heir ſhall have a new formedon. Heath's Max. 58.

10. *But* where in *formedon, cui in vita, mortdanceſtor*, and the like, ſuch a plea is pleaded, either againſt the iſſue in tail, or the heir of tenant by the curteſy, &c. and no *aſſets found*, and after *aſſets* deſcend, the defendant in the firſt action ſhall have *ſcire facias* for the *aſſets*, if the firſt action be a *formedon*; otherwiſe, as it ſeems, for the firſt land. Quære. Heath's Max. 58.

11. And ſee 11 H. 4. and 4 H. 6. Br. tit. Sci. Fa. 74. and 130. in the laſt of which it is doubted when executors plead *fully adminiſtered*, and it is found for them, and afterwards *aſſets* deſcend, whether the plaintiff be not driven to a *new action*, or may have a *ſci. fa.* thereupon, viz. upon the firſt judgment. Heath's Max. 58.

12. Which ſeems not by the 40 Ed. 3. and 43 Ed. 3. per Brook. in tit. Sci. Fa. 17 and 29. where a difference is taken when the plaintiff is barred, and when he doth recover. Heath's Max. 59.

Lev. 286. S. C.—— 2 Keb. 606. S. C.

13. Upon plene adminiſtravit, plaintiff may have judgment, and to have execution of aſſets *cum acciderint*. Sid. 448. Paſch. 22 Car. 2. B. R. Noel v. Nelſon.

Ld. Raym. Rep. 679. S. C. and by Holt Ch. J. the executor ſhall not be liable till more aſſets happen, becauſe the plaintiff did not take judgment to have execution of aſſets generally when they ſhould happen, but of aſſets over what would ſatisfy the judgments.

14. Where an *adminiſtrator pleads two or more judgments, and the plaintiff confeſſes the plea to be true, and prays judgment of aſſets in futuro*, &c. if aſſets ſhould come afterwards to his hands, he may ſatisfy the judgments pleaded, becauſe the judgment of aſſets de futuro is only to be diſcharged after the other judgments are ſatisfied. 1 Salk. 312. pl. 16. Trin. 13 W. 3. B. R. the 5th reſolution in caſe of Parker v. Atfield.

15. One dies indebted by mortgage and ſimple contract. One of the *creditors by ſimple contract gets judgment of aſſets quando acciderint*, yet where aſſets come in by the *aid of equity*, the other ſimple contract creditors ſtand in the place of the mortgagee as to what he has exhauſted out of the perſonal aſſets; but if aſſets at law come, they muſt be applied in a courſe of adminiſtration, and ſuch judgment-creditor will be preferred. 2 Vern. 763. pl. 663. Mich. 1718. Wilſon v. Field.

[383] 16. *In an injunction* the words pro defectu placiti, &c. are intended of an iſſuable plea, and the words judicium intrare are intended of a final judgment; therefore if the defendant be an *executor, and pleads plene adminiſtravit, and the plaintiff at law enters judgment de bonis teſtatoris cum acciderint, he may proceed to a ſcire facias to inquire of aſſets, and enter judgment thereupon*; for the meaning of the injunction is, that the defendant may proceed ſo far, as that nothing ſhall remain but to take out execution after the injunction is diſſolved. 3 Wms.'s Rep. 146. Mich. 1732. in a nota of the Reporter to the caſe of Morrice v. Hankey.

## (C. b) Judgments againſt Executors.

### Judgment General.

### [Upon a falſe Plea.]

[1. 1 Rep. 9. MOUNTJOY, in action upon *aſſumpſit of the adminiſtrator*, in conſideration that adminiſtration was committed to him, and that he has aſſets to pay, he promiſed to pay the debt due by the teſtator; defendant *pleads non aſſumpſit*, and found againſt him, and judgment general given, and not de bonis defuncti. 9 Rep. 94. BANE'S CASE.]

[2. If executor *pleads ne unques executor*, &c. and is found executor, judgment ſhall be general to recover the debt. 46 E. 3. 10. 1 R. 3. 3. for his *falſe plea*. 9 H. 6. 44. b. 11 H. 6. 8. 16. Hill. 12 Car. B. R. in writ of error brought there, † lien of adminiſtrators. * 46 E. 3. 10. between CRESWELL AND GREEN, and judgment given to recover de bonis teſtatoris; contra Brooke, that it ſhall be a conditional judgment. 11 H. 6. 16. b. in the court of Lynn reverſed for thoſe cauſes. Intratur Hill. 11 Car. Rot. 234.]

* Br. Executors, pl. 34. cites S. C.—— In debt againſt two executors, if the one pleads ne unques executor, &c. and the other pleads another plea, and it is found againſt them, the judgment ſhall be that the plaintiff recover of the goods of the deceaſed if they have, and if they have not, &c. then againſt him who pleaded ne unques executor of his proper goods. Br. Dette, pl. 177. cites 11 H. 6, 7. and 16. Judgment ſhall be de bonis propriis. Br. Executor, pl. 51. cites 11 H. 4. 5.

† So it is in the original; but quære, how to be tranſlated?

[3. So if in an action againſt *divers executors, and one pleads ne unques executor*, &c. if it be found againſt him, the judgment ſhall be general *againſt him to recover the debt*. 46 E. 3. 3.]

It was found that he was executor and adminiſtered. Br. Executor, pl. 34. cites 46 E. 3. 9, 10. [And ſo it ſeems it ſhould be here, and that 46 E. 3. (3.) is miſprinted.]

So where adminiſtrators denied that they were adminiſtrators, and it was found againſt them, and that they had 4 l. in their hands, where the demand was of 4 l. the judgment was, that plaintiff recover againſt them 4 l. for their falſe plea; quod nota. Ibid. cites the ſame term.

[4. *But if aſſets are found in the hands of the other* executor, *for part of the debt*, then the judgment againſt the other, who pleaded the falſe plea, ſhall be *to recover the reſidue of the debt*. ‡ 46 E. 3. 10. 11 H. 6. 37. b. Contra ‖ 11 H. 6. 7. b. 16. b.]

‡ Br. Executors, pl. 34. cites S. C.—— The other executor pleaded fully adminiſtered, and it was found that he had in his hands 6 l. and judgment was, that the plaintiff recover the 6 l. from his executor, and the reſidue againſt the other as if he had denied the deed of the teſtator. Br. Executors, pl. 34. cites 46 E. 3. 9, 10.——Br. Adminiſtrators, pl. 12. cites S. C.——‖ See pl. 2. in the notes.

[5. *Note, that in thoſe caſes, if it appears to the Court*, as by finding of the jury, *that the executor has not aſſets* in his hands, then upon ſuch falſe plea the judgment ſhall be general; for it will be in vain to give judgment of the goods of the deceaſed, if he has, &c. when

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when it apears that he has not any, and ſo the caſes above are to be underſtood, for ſo is 43 E. 3. 10.]

[6. If *fully adminiſtered* be pleaded in *debt*, and found againſt the executor, the judgment *for the damages* ſhall be *general.* * 11 H. 4. 5. 11 H. 6. 39.]

* Fitzh. Judgment, 98. S. P. and the plaintiff had capias ad ſatisfaciendum of the damages againſt the executor. Br. Executors, pl. 51. cites S. C.—— If they plead plene adminiſtravit but ſo much, or plene adminiſtravit generally, the judgment ſhall be of the goods of the deceaſed of the principal debt, and of the damages of their proper goods, per Moile. Br. Executors, pl. 108. cites 2 E. 4. 4.——And where elongaverunt is returned, he ſhall have execution of the goods of the deceaſed if they have, and if not de bonis propriis. Ibid.——But the judgment for the debt ſhall be of the goods of the deceaſed. Ibid.——Neſſ. Abr. 176. pl. 8. tit. Adminiſtration, cites Godb. 178. Newman v. Balingſton, S. P. viz. that capias ad ſatisfaciendum lies for the damages, but Godb. mentions nothing there to that purpoſe, for which ſee (B. b) Newman v. Babbington.

[7. *So in detinue*, the judgment for the damages ſhall be general. 11 H. 6. 39.]

S. P. Br. Executors, pl. 108. cites 2 E. 4. 4. for their proper goods ſhall never be put in execution if they have of the goods of the deceaſed.

[8. In an action of *debt* againſt an executor, who *pleads ne unques executor, ne unques adminiſtravit as executor*, and this is found againſt him, the judgment ſhall be de bonis teſtatoris ſi, & ſi non de bonis propriis, *as well of the debt as of the damages and coſts.* Tr. 15 Car. B. R. BETWEEN STREET AND WISE, in a writ of error upon ſuch judgment in Totneſs in Devon, and this aſſigned for error; yet the judgment affirmed per Cur. becauſe ſo is the common courſe. Intratur Hill. 14 Car. Rot. 751.]

Cro. E. 518. pl. 20. and 526. pl. 6. S. C.—— Jo. 417. pl. 5. S. C.

[9. In an action of *debt againſt baron and feme, as executors* of A. upon which judgment is given againſt them *by nihil dicit* de bonis teſtatoris ſi, &c. & ſi non *for damages and coſts de bonis propriis*, and after a *devaſtavit is returned* againſt the defendants, the *judgment ſhall be to recover the debt, damages, and coſts de bonis propriis*, of the baron and feme. M. 14 Car. B. R. BETWEEN MOUNSON AND BOURNE, and Hill. 14 Car. adjudged per Cur. after arguments at bar, becauſe it is *the common courſe*, though the feme † cannot properly convert to her own uſe, for ſhe may have goods † as executrix, though ſhe be a feme covert, and peradventure the baron is charged only for conformity in reſpect of the wife.]

† Fol. 931.

D. 60. pl. 188. Trin. 6 Eliz. Anon. S. P. Cro. C. 603. pl. 7. King v. Hilton, S. C. adjudged.—— Dal. 70. pl. 44. S. C. in totidem verbis.

[10. In debt againſt executor for *rent* upon a leaſe for years *incurred after death of teſtator*, if plaintiff recovers, the judgment ſhall be general. 14 H. 4. 29.]

[11. If *A. recovers againſt B.* debt and damages, and after *B. dies, and adminiſtration is granted to C.* his *wife, who waſtes* the goods, *and after takes D. to baron*, and a *fi. fa.* is awarded *de bonis teſtatoris in the hands of D. and C.* and the ſheriff returns *nulla bona*, &c. and upon this, upon ſurmiſe that they have waſted the goods, *another writ* is awarded to the ſheriff, *ſi ſibi conſtare poterit per inquiſitionem, that they have waſted* the goods, then to warn them to ſhew cauſe why execution ſhould not be *de bonis propriis*, and upon this the ſheriff takes an inquiſition, which finds

finds this matter, and refers it to the Court, whether the baron and feme have waſted the goods of the teſtator, and converted * them to their own uſe, according to the writ or not; upon this ſpecial return the Court awarded execution of the proper goods of baron and feme, for the ſheriff has returned the ſpecial matter; and by this the baron is to be charged for the converſion of the feme. M. 16 Car. B. R. adjudged per Cur. KNIGHT AND HILTON AND HIS WIFE ADMINISTRATRIX AGAINST COPPING.]

12. If executors are at iſſue upon plene adminiſtravit, and *it is found that they have fully adminiſtered, except in one county, or* that they have fully adminiſtered, *except* 20*s.* they ſhall be charged of 100*l.* for the contrary of their iſſue is found. Br. Executors, pl. 82. cites 24 E. 3. 26. 27. 47, 48.

13. *Debt for* 20 *l.* againſt executors, who *pleaded riens enter mains*, and *it is found that they have* 5*l.* they ſhall not be charged but of 5l. *Contra* of the plea of *ne unques executor*. Br. Executors, pl. 141. cites 40 E. 3. 15. & 34 H. 6. 22, 23.

14. *Debt againſt two* executors, *at the pluries or diſtreſs the one confeſſed the action*, the plaintiff ſhall have *judgment againſt him generally*, and *againſt the others of the goods of the deceaſed*, and the reaſon ſeems to be, becauſe he did not deny but that he had aſſets; for if it be otherwiſe, he might have ſaid that he had nothing but 10*s.* &c. and confeſſed the action; *and upon fi. fa. againſt executors it is no return that all the executors but one has nothing;* for the poſſeſſion of one is the poſſeſſion of all, and other fi. fa. ſhall iſſue againſt all; for they might have goods after; and the ſheriff, who returned that the executors had ſold the goods for money, and for other goods, was amerced; for he might have execution of the goods of the executors amounting to ſo much, &c. Br. Executors, pl. 63. cites 14 H. 4. 12.

15. *Debt* againſt L. and others of R. S. *of* 40*l.* who *pleaded plene adminiſtravit;* the *other ſaid that aſſets;* and it was *found that they had goods of the deceaſed, the day of the writ, to the value of* 20*l.* and no more, *and put damages to* 5*l.* and it was awarded that the plaintiff recover only 20 *l. of the goods of the deceaſed*, and *the* 5 *l. de bonis propriis;* and as to the other 20l. that the plaintiff be amerced; and of the 20l. recovered, the plaintiff had fi. fa. of the goods of the deceaſed, and of the 5l. ca. ſa. quod nota, by the falſe plea. Br. Executor, pl. 76. cites 21 H. 6. 40, 41.

16. Debt againſt executor; per Chocke J. if the *executor delivers legacies, the debts not paid, and the reſt not ſufficient to pay the debts*, they ſhall be charged of his proper goods; per Littleton J. he cannot know the debts unleſs they are demanded, and therefore, *if they are not demanded, they may pay legacies*, otherwiſe it ſhall be long before the legacies ſhall be paid, *and he is not bound to take conuſance of the debts without demand, unleſs of debt of the king;* per Chocke and Brian, this is all one; for the king has no prerogative in this, unleſs his debt be *of record*. Br. Executors, pl. 116. cites 21 E. 4. 21.

17. *Debt againſt an executor upon the bond of the firſt teſtator;* the defendant *pleaded that the firſt teſtator did owe* 100l. *to his teſtator*,

*tator, after whoſe death goods of the value of* 100l. *came to his teſtator, as executor of the firſt teſtator, which he retained, and ultra the ſaid goods his teſtator in vita ſua plene adminiſtravit.* The plaintiff *replied aſſets in London tempore mortis of the ſaid teſtator, and* it was *found for him*, and he had judgment de bonis of the firſt teſtator in the hands of the defendant, and damages de bonis propriis; and thereupon a ſci. fa. was brought againſt the defendant; upon which the ſheriff returned a devaſtavit, and the plaintiff had judgment and execution de bonis propriis of the defendant, and if nulla bona, then he might have either a ca. ſa. or an elegit. Nelſ. Abr. 790. pl. 2. cites 3 Eliz. Dyer, 185. [b. pl. 66. Trin. 2 Eliz. Woodward v. Chicheſter.]

[386] 18. In *debt againſt the executor of an executor*, the defendant *pleaded, that the executor's teſtator had fully adminiſtered, and that he had nothing in his hands at the time of his death;* and it was *found that he had aſſets;* whereupon a *fieri facias iſſued to the ſheriff, and he returned that the defendant had nothing*, and it was held, that the ſheriff ſhould be amerced, for he ſhall be eſtopped to make ſuch a return, and that it ſhould be no prejudice to the plaintiff, for that the debt ſhall be charged ſo long as the record remains in force, not reverſed by error nor attaint; and if he hath no goods of the teſtator's, *he ſhall be charged of his own proper goods;* for that *when he pleaded that the firſt executor had fully adminiſtered, he did not deny but that aſſets came to him after the death of the teſtator.* Mo. 23. pl. 81. Paſch. 3 Eliz. Anon.

19. Executor pleads *releaſe to himſelf*, which is found *falſe*, judgment ſhall be de bonis propriis; but if he pleads *falſe releaſe made to teſtator*, it is otherwiſe. Mo. 70. pl. 188. Trin. 6 Eliz. Anon.

20. The Court inclined, that *if upon riens enter mains* pleaded, it is found *that ſome part of the ſum in demand is in the hands of the executors*, there the plaintiff, *upon a ſurmiſe of goods come to the executors' hands, ſhall have a ſcire facias*, but not where on ſuch iſſue it is found fully for defendants that they have nothing in their hands. Le. 68. pl. 87. Mich. 29 & 30 Eliz. C. B. Bracebridge v. Baſkervile.

21. Error of a judgment in C. B. for that in *debt againſt huſband and wife, as executrix*, the defendant *pleaded payment by the wife after the death of the inteſtate, according to the condition of the bond*, and iſſue being joined, *was found for the plaintiff*, and *judgment was quod recuperet debitum againſt them, de bonis teſtatoris, & ſi non, &c. the damages de bonis propriis;* it was objected that the judgment ought to have been de bonis propriis, becauſe the plea was falſe; and for the damages de bonis propriis of the baron only; for a feme covert cannot have any goods; but the Court held the judgment well given, though the plea is falſe; yet he is altogether a ſtranger to the inteſtate, who was her firſt huſband; and though ſhe hath no goods during the coverture, yet becauſe the huſband is charged only in reſpect of his wife, and ſhe might have goods, if ſhe ſhould ſurvive him, and execution might be then taken againſt her, therefore the judgment was affirmed good. And ſo

are

are all the precedents, as Mann informed the Court. Cro. J. 191. pl. 17. Mich. 5 Jac. B. R. Johns v. Adams.

22. Where an executor *pleads plene adminiſtravit*, and it is *found againſt him*, the judgment ſhall be de bonis propriis, becauſe it is a falſe plea in his own conuſance. Cro. J. 191. Mich. 5 Jac. B. R. in caſe of Johns v. Adams.

23. In *debt againſt baron, and feme as executrix*, &c. they *plead payment by the teſtator*, and upon iſſue it is found againſt them, and judgment quod recuperet debitum de bonis teſtatoris, and the coſts and damages de bonis propriis; and in error it was held to be a good judgment, although a feme covert cannot have goods in her own right, yet ſhe may have them as executrix, and ſo judgment affirmed. Noy, 125. Anon.

24. *Judgment upon a ſcire facias* againſt an executor, and an *inquiry*, and *returned that* he *diverſa bona teſtatoris diſpoſuit, elongavit & ad proprium uſum convertit*, he comes in and *pleads that he was never executor, or adminiſtered as executor*, and traverſes *abſque hoc*, that he bona teſtatoris diſpoſuit, &c. whereupon iſſue joined, and *found againſt him*, and judgment, which was held good upon a writ of error; for he having gone off from his plea of ne unques executor, and traverſed the *converſion*, it *ſhall be intended* a converſion *as executor*. Skin. 85. pl. 3. Hill. 35 Car. 2. B. R. Bird v. Harriſon.

25. If executor *ſuffers* judgment to go againſt him *by default*, upon executing writ of inquiry, he ſhall not give evidence of want of aſſets, for he is *eſtopped*; for he ſhould have pleaded plene adminiſtravit, or ſpecially what aſſets he has; per Cur. 6 Mod. 38. Mich. 3 Ann. B. R. Treil v. Edwards. [387]

## (D. b) [Judgment.]

### In what Caſes it ſhall be De Bonis Teſtatoris only.

[1. IF a recovery of a debt be againſt an executor by *nient dedire*, the judgment ſhall be de bonis teſtatoris only. 25 E. 3. 41. b.]

[2. If executor *pleads* in abatement that *another executor, not named*, adminiſtered, and it is found againſt him, the judgment ſhall be of the goods of teſtator only. 11 H. 6. 8. dubitatur. 9 H. 6. Contra 7 H. 4. 13.]

[3. If upon *fully adminiſtered* pleaded it be found againſt the executor, judgment ſhall be of the debt of the goods of teſtator only. 7 H. 4. 13. 11 H. 4. 5. 9 H. 6. 44. b. 11 H. 6. 8.]

But where upon ſuch plea the verdict found aſſets a ſpecial fieri facias was awarded of the goods of the deceaſed, and if if can appear that they are waſted, then de bonis propriis. But this alters the caſe much; alſo by the devaſtavit the judgment ſhall be altered, viz. that execution ſhall be de bonis propriis, which cannot be without a return of the ſheriff. Noy, 7. Williams v. Roberts.

[4. In debt againſt executor, if he *pleads a falſe acquittance*, and this is found againſt him, yet he ſhall be charged de bonis teſtatoris only;

only; for he doth not eſtrange himſelf from the teſtament by this plea. Contra 11 H. 6. 8.]

S. P. and not de bonis propriis; for the executor cannot have conuſance whether it was the deed of teſtator or not. Br. Executor, pl. 109. cites 6 E. 4. 1.

[5. In debt againſt executor upon a *bond* made by teſtator, if the executor *denies the deed*, and this is found againſt him, the judgment ſhall be only de bonis teſtatoris. Contra 17 E. 3. 20. 45. b. adjudged.]

And. 150. pl. 197. Bracebridge v. Barkerville. Hill. 29 Eliz. S. P. adjudged accordingly by all the juſtices for ſeveral reaſons; 1ſt, Becauſe the plea is true; for there is ſuch a record as the defendant pleaded, though the plaintiff confeſſed and avoided it, and it is not like to where it is utterly falſe, as when one pleads ne unques executor, ne unques adminiſter as executor, &c. which plea lying in his own knowledge to be utterly falſe, is the cauſe that in ſuch caſe the judgment is de bonis propriis, &c.——S. P. by Dyer, Mo. 70. pl. 188. Trin. 6 Eliz.

[6. In an action of debt againſt an executor, if the defendant *pleads a judgment had againſt him*, in a former action brought againſt him by another, and that he has nothing in his hands but to ſatisfy this, and the *plaintiff replies* that the ſaid judgment was acknowledged *by covin* to defraud the creditors, which is *found accordingly*, though this falſe plea is found againſt him, yet the judgment ſhall be only de bonis teſtatoris. Trin. 42 El. B. R. adjudged between BORRET AND BOYES.]

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[7. If a man *recovers damages againſt an executor* or adminiſtrator in an action of covenant againſt him, *upon a breach of covenant by teſtator*, the judgment ſhall be de bonis teſtatoris only, becauſe *he could not have prevented it*, and here the duty is *recovered all in damages*. M. 37 El. B. R. agreed per Cur. between HOLT AND HORE.]

[8. So the judgment ſhall be de bonis teſtatoris only, though the *covenant was broken by the executor or adminiſtrator himſelf*; becauſe all the duty is to be *recovered in damages* in this action. Held M. 37 El. B. R. in caſe of HOLT AGAINST HORE. D. 15 El. 324. 34. adjudged. M. 21 Ja. B. R. adjudged in writ of error between * BRIDGMAN AND LIGHTFOOT. And judgment given in B. De bonis teſtatoris ſi, &c. et ſi non, &c. De bonis propriis reverſed. Where the caſe was, that leſſee for years of an advowſon granted the next avoidance † to B. who covenanted, that if he would grant this preſentment to any one, leſſor ſhould have the offer and refuſal of it; B. dies, and his executor grants it to another, without any offer made to the leſſor, upon which leſſor brought action of covenant againſt the executor, who pleads non conceſſit, and this is found againſt him, and damages given, &c. and the Court thought this was only a nonfeaſance, and no act done by the executor. Hob. 254. between ‡ COLLINS AND THOROUGHGOOD. Adjudged where the breach was for want of reparations by the executor.]

* Cro. J. 671. pl. 3. S. C. adjudged. — 2 Roll. Rep. 415. S. C. adjudged, but not clearly ſtated. —— ‡ Hob. 188. pl. 229. S. C.

† Fol. 932.

[9. In action of *debt* againſt an executor upon *obligation*, whereof the condition was *for performance of covenants*, and a breach aſſigned in *doing of a thing by the executor againſt the covenant*, and this found againſt the executor, though the breach of the obligation was by the executor himſelf, yet judgment ſhall be de bonis teſtatoris only. Adjudged Hob. 362. Trin. 17 Jac. CASTILLION AGAINST SMITH.]

Hutt. 35. S. C. reſolved. — Hob. 283. pl. 363. S. C.

10. Where

10. Where the writ is in the detinet only, the judgment ſhall be de bonis teſtatoris; per Curiam. Hutt. 35. Trin. 17 Jac. in caſe of Caſtilion v. Smith.

Ibid. ſays ſee the like judgment. Hill. 33 Eliz. Rot. 1143. Johnſon v. Barker.

11. If *judgment* be given *in debt*, and a *ſci. fa. brought againſt his executor, who pleads that he was not executor, nor that he ever adminiſtered*, &c. and it is found againſt him, yet the Court agreed that the *judgment ſhall be de bonis teſtatoris tantum*; becauſe the execution ſhall relate to the judgment, and ſcire facias is to know why he ſhould not have execution of the firſt judgment, and this extends only to the goods of the teſtator; and Moyle Prothonotary ſaid, it was ruled ſo in C. B. in 5 Jac. Litt. Rep. 53. Mich. 3 Car. C. B. Anon.

12. In covenant, the plaintiff declared againſt Chriſtopher Guyſe, baronet, for that he (the plaintiff) granted a leaſe to one Geo. Harvey, of the rectory of Berkley, for 60 years after the determination of a leaſe then in being, which leaſe expired, and that Harvey covenanted for himſelf and his aſſigns to repair, whoſe eſtate one William Guiſe had by aſſignment, &c. who made the defendant executor, and died, and that the chancel was out of repair in the time of the teſtator, and ſince, and alſo one great barn, &c. The defendant, as to not repairing the chancel, pleaded that the plaintiff did not leaſe it to Harvey, and thereupon they were at iſſue; and as to the barn, he demurred, and the plaintiff had a verdict upon the iſſue, and 300l. damages, and alſo 200l. damages for not repairing the barn, if judgment ſhould be againſt the defendant upon a demurrer; and upon arguing the demurrer, it was inſiſted for the defendant, that the plaintiff was miſtaken in the action, for it was brought againſt the defendant in his own right, when, upon the plaintiff's own ſhewing, it * ought to be brought againſt him as executor, and as ſuch, and not otherwiſe, he ought to be diſcharged; for he is not liable to this covenant, but in reſpect of aſſets of the teſtator, and therefore the judgment againſt him ſhould be de bonis teſtatoris, and ſo it was adjudged, and that this objection was as well to the verdict, as to the demurrer. Nelſ. Abr. 174, 175. pl. 16. cites 1 Saund. 111. [Mich. 19 Car. 2. pl. 17.] Dean and Chapter of Briſtol v. Guiſe.

But the reporter adds a nota, that it ſeems to him, that the declaration being by bill was good enough, for upon the whole matter the plaintiffs have declared againſt the defendant as executor, though in the beginning he is not ſo named, which is only form; and the plaintiffs might very well have their judgment for their damages de bonis teſtatoris on this declaration, but it was not moved. There was alſo another exception to the declaration, viz. that a que eſtate could not be pleaded of a term, and cites Cro. 25 Eliz. 22.

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13. In *debt* upon an obligation againſt an executor, *judgment* was *by default*, and becauſe the *bond had been a long time unpaid*, it was moved that the damages might be *increaſed* by the Court *under a notion of coſts*, as the practice was agreed to be uſed; but Holt Ch. J. ſaid, that the *damages are to be adjudged* againſt the executor *out of the eſtate of the teſtator*, *but* judgment *for coſts* ought to be *out of the eſtate of the teſtator ſi tantum, ſi non, de bonis propriis*, and it would be hard to charge the executor in damages under the title of coſts for the time in which the bond was elapſed in the life of

the teſtator, but he ſeemed to incline that it ſhall be ſo for the time in which the bond was unpaid after the death of the teſtator; but upon examination it was ſaid that the judgment was entered, and then per Cur. it is too late, and ſo nothing was done. Skin. 561. pl. 8. Mich. 6 W. & M. in B. R. Rolſton v. Main.

14. *Leſſee covenanted to repair* and dies, and his executor *aſſigned over his term*, and the *aſſignee dies*, and *his executor ſuffers the premiſes to be out of repair. Covenant was brought againſt the executor as executor.* Judgment ſhall be de bonis teſtatoris only, though he *might have been charged as aſſignee.* 1 Salk. 316. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

## [(E. b) Judgment.]

### Execution of it.

[1. IF an execution *iſſues to the ſheriff to levy the debt of the goods of the teſtator*, if executor has *ſold the goods* of the teſtator *before the writ purchaſed, and has taken money and other goods for the ſame goods*, the ſheriff cannot make execution of his proper goods, but ought to return it to the court. 2 H. 6. 12. admitted. Contra 14 H. 4. 12. b. adjudged.]

2. *Debt* againſt *executors who plead plene adminiſtravit*, and *aſſets is found againſt them*, and upon this judgment was given of the goods of the deceaſed, and upon the fi. fa. the *ſheriff returned devaſtaverunt*, and thereupon capias was awarded againſt the executor where no capias lies at firſt; quod nota by award. Br. Executor, pl. 8. cites 2 H. 6. 12.

*[390] Ibid. cites Mounſon and Bourn, 1 Jo. 417. ſaid to be S. C. as this of Pettifer, ſave that the executors upon the ſcire facias were warned, appeared and demurred, and upon a reſpondeas ouſter, judgment given de bonis propriis, and upon a writ of error affirmed by the whole Court, and ſaid, admitting Pettifer's caſe law, which they neither abſolutely affirmed nor diſaffirmed, yet this caſe ſtands on good reaſon. In Pettifer's caſe the judgment was on nihil returned, but here was warning returned and an appearance, and the parties might have pleaded they had not waſted the goods, ſo that if there was any prejudice, it was by their own default in not traverſing the waſte; and the Court adviſed the clerks to uſe this courſe hereafter, as a good and legal courſe for the expedition of juſtice and execution. ——— Cro. Car. 518. 526, 527. S. C. adjudged, and ſaid it differed

3. If *in Banco* a judgment is given againſt executors to recover a debt *de bonis teſtatoris*, and thereupon a fieri facias iſſues, and the ſheriff returns *nulla bona*, upon which an entry is made in the roll *quod teſtatum eſt*, that the executors have ſold ſeveral goods of the * teſtator, and converted the money to their own uſe, upon which a writ is awarded to inquire what goods were waſted, and the ſheriff returns an inquiſition, by which it was found that ſeveral goods of the teſtator to the value of the debt were waſted by the executors, and thereupon a ſcire facias to ſhew cauſe why execution ſhould not be of their own goods, and upon two nihils execution is awarded; this is erroneous, for though the inquiſition is falſe the parties are without remedy, and it might be miſchievous to executors who might not have notice, the action ſometimes being brought in a foreign county. Adjudged in B. R. upon a writ of error in redditione executionis only, and the execution reverſed, but judgment ſtood. 5 Rep. 32. Hill. 45 Eliz. Pettifer's caſe. 3 Danv. 404. pl. 2.

differed from Pettifer's, and vide Gibſon and Brook, Cro. Eliz. 859. Ow. 132, 133. [Jaques v. Collins]. Lit. Rep. 47. [Archer v. Dalbye]. Palm. 280. [Cluther v. Thinn]. 2 Sid. 103, 104. [Fitcher v. Wolſton]. Sty. 56, 57. Skin. 85, 86. [Bird v. Harriſon].

4. But if judgment is given againſt executors, and upon a fi. fa. nulla bona returned, the plaintiff may have a ſpecial writ of fieri facias to levy the debts of the goods of the deceaſed, & ſi tibi conſtare poterit, that the executors have waſted the goods, then de bonis propriis, which is agreeable with law and reaſon; for if the ſheriff makes a falſe return, the parties may have remedy by action. Per Curiam. 3 Danv. 404. pl. 3. cites 5 Rep. 32. in Pettifer's caſe.

5. *Debt* againſt an adminiſtrator, who *pleaded that before the action brought the adminiſtration was revoked and granted to another, he having then aſſets in his hands to the value of* 200 *l. which he had delivered over to the new adminiſtrator.* The plaintiff *replied*, that it was done by *fraud and covin*, upon which they were at iſſue, *and ſo it was found*, and thereupon the plaintiff had judgment to recover the debt de bonis teſtatoris. It was aſſigned for error, that the judgment ought not to be abſolute de bonis teſtatoris only, but conditional, ſi tantum, &c. but the whole Court diſallowed of this error very much, and all held clearly that the judgment abſolutely given was good, and they were not conſtrained in this caſe to give a judgment conditional, and affirmed the judgment. Bulſt. 187. Paſch. 10 Jac. Morgan v. Soke.

## (F. b) In what Caſes it ſhall be de Bonis Teſtatoris if he has, ſi non, de Bonis propriis.

[1. IN debt againſt *baron and feme executor in right of the feme*, if plaintiff recovers, and *ſheriff returns that the baron has converted the* goods, the plaintiff ſhall have execution de bonis propriis of the baron. 18 H. 6. 4. b.]

[2. Upon a judgment againſt executor to recover of the goods of teſtator, if *ſheriff returns that the goods are* * *eſloigned*, the judgment ſhall be of his proper goods. 9 H. 6. 57. b. Curia.]

* Orig. is (eſloigned). —Br. Executor, pl. 14. cites S. C.

——Br. Retorn de Briefs, pl. 8. cites S. C.

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[3. So if he *returns that they are waſted.* 11 H. 6. 16. 35. b.]

So if the ſheriff returns that before the coming of the writ, they ſold the goods for certain money, which they took to their own uſe; quod nota. Br. Execution, pl. 36. cites S. C. ——S. P. Br. Executors, pl. 56. cites S. C.

[4. Upon judgment of the goods of the deceaſed, if the *ſheriff returns that he had ſo much aſſets but has waſted them*, upon this return the judgment ſhall be of the goods of the deceaſed if he has, if not de bonis propriis. 11 H. 4. 70.]

[5. But ſee 2 H. 6. 12. b. a *capias* awarded upon ſuch return, and ſo judgment abſolute of his proper goods. 11 H. 6. 7. b.]

[6. Upon *fully adminiſtered* pleaded, if 20 *l. aſſets are found*, and judgment upon it, and the *ſheriff returns that he has not aſſets in his bailiwick*, judgment ſhall be de bonis teſtatoris ſi, &c. ſi non, de bonis propriis. 9 H. 6. 9. b.]

[7. *So* if he returns *that they have not aſſets within his bailiwick prout ei conſtare poterit*, becauſe it appears in a manner that the goods are *eſloigned*, the judgment ſhall be to recover of the goods of the deceaſed, and ſi vicecomiti conſtare poterit that they are eſloigned, de bonis propriis. 9 H. 6. 58.]

[8. If the ſheriff return *that he has nothing of the goods of the deceaſed*, upon a *ſuggeſtion made by the plaintiff that he has aliened* the aſſets, he ſhall have *ſpecial writ*, ſcilicet, ſi ita ſit to make execution of his proper goods. 11 H. 6. 8. 35. b.]

[9. If a man *recovers debt and damages againſt an executor* he ſhall recover *damages* de bonis teſtatoris ſi, &c. ſi non, de bonis propriis. 8 Rep. 134. Ma. Shipley's case, dubitatur, 3 H. 6. 5.]

[10. In an action againſt *divers executors*, if *one plead ne unques executor, and the others plead fully adminiſtered*, or ſuch like, and this is found againſt them, the judgment ſhall be of the goods of the dead *againſt all if they have, ſi non* * *de bonis propriis againſt him who pleaded ne unques executor*, &c. Contra 11 H. 6. 37. b.]

* Fol. 933.

[11. In an action of debt againſt an executor, if the defendant *appears at the return of the ſummons and makes defence, et nihil dicit in barram*, by which judgment is given againſt him by nihil dicit, the judgment ſhall be *as to the damages and coſts* de bonis teſtatoris, ſi, &c. & ſi non, de bonis propriis. Hill. 14 Car. B. R. adjudged per Cur. between Mounson and Bourn in writ of error upon ſuch judgment in Bank, for this is the *uſual courſe* intratur.]

Cro. C. 519. pl. 20. & 526. pl. 6. S. C. adjudged.

[12. If the executor *comes* at the firſt, ſcilicet, *at the return of the ſummons, and acknowledges the action*, yet judgment ſhall be given againſt him as to the *damages and coſts* de bonis teſtatoris, ſi, &c. & ſi non, de bonis propriis. Held per Bramſton, Hill. 14 Car. in the ſaid caſe of Mounson against Bourne.]

[13. If the executor at the firſt day, ſcilicet, *at the return of the ſummons, acknowledges the action, and ſaith that he has no aſſets*, the judgment ſhall be for *coſts and damages* only de bonis teſtatoris, *if it be true.* Held per Bramſton in the ſaid caſe.]

[14. If the executor comes *at the return of the ſummons* and *pleads* that he has been *always ready, and yet is*, and this *is true*, the judgment ſhall be only de bonis teſtatoris for *coſts and damages*. Per Bramſton in the ſaid caſe of Mounson against Bourne.]

[15. In an action againſt executor or adminiſtrator, if defendant *pleads ne unques executor*, ne unques *adminiſtered as executor*, and this found againſt him, the judgment ſhall be de bonis teſtatoris ſi, &c. ſi non, de bonis propriis for his *falſe plea*.]

This is to be underſtood where the immediate executorſhip of the defendant is denied, for if A. makes B. executor, and B. dying makes C. executor, now if C. be ſued † for A.'s debt as executor to B. executor of A. and he denies that B. was executor of A. which by conſequence is a denial of his being now executor of A. yet if on trial it be againſt him, his own goods ſhall not be liable to this debt, becauſe he might poſſibly not know to whom his teſtator was executor. Went. Off. Ex. 187.

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[16. *But if a man recovers debt or damages againſt the teſtator*, and after ſues a *ſcire facias againſt the executor or adminiſtrator*, who pleads *ne unques* executor, ne unques adminiſtered as executor, and this is found againſt him, yet the judgment ſhall be only de bonis teſtatoris, becauſe *he prays in the writ of ſcire facias to have execution of the goods of the teſtator*, and therefore againſt his prayer he ſhall not have execution of his proper goods. Mich. 3 Car. B. adjudged per Cur. WALDRON AGAINST BERRY.]

17. *Debt* againſt *executor* who *pleaded plene adminiſtravit*, and the jury *found aſſets*, and the *ſheriff returned the fi. fa. nihil*, by which upon argument it was agreed per Paſton and Babbington, that *ſpecial fi. fa. ſhall iſſue again of the goods of the deceaſed, and ſi conſtare poterit that the goods are eſloigned, then de bonis propriis*, and ſo ſhall not have fi. fa. de bonis propriis at firſt, as the plaintiff prayed; quod nota bene. Br. Executor, pl. 11. cites 9 H. 6. 9.

18. It ſeems by the opinion of the Court, that if executors are impleaded, they *ſhall be charged of ſuch goods as they had the day of the writ purchaſed*, and *if they ſell before judgment, they ſhall be charged of their proper goods*; but it is ſaid there, that a ſale after judgment is not good. Br. Executor, pl. 14. cites 9 H. 6. 57. Br. Retorn de Brief. pl. 8. cites S. C.

19. *Fi. fa. againſt executors* upon a judgment againſt them; the *ſheriff returned that the executors have ſold the goods of the deceaſed and converted them* to their own uſe, by which iſſued *ſci. fa.* &c. *de bonis propriis*; quod nota. Br. Executors, pl. 71. cites 19 H. 6. 49, 50.

20. *Debt againſt two executors, one of them appeared and confeſſed the action, and the other made default, and judgment given to recover de bonis of the teſtator in both their hands*, and to the ſame effect iſſued a *fi. fa. againſt both*, the *ſheriff returned that they had then nulla bona, &c. but that he that made default had goods of the teſtator to the value of the debt, but had waſted them ante receptione brevis, &c. prout ſibi conſtabat*, and upon this return a ſcire facias iſſued againſt him alone, and upon ſcire feci returned execution was awarded againſt him only of his own proper goods. D. 210. a. pl. 23. cites Paſch. 4 H. 8.

21. *Debt* was againſt executors *upon an obligation, which* was, *that if the teſtator or his executor at Mich. every year during the life of the obligee delivered to the obligee a load of dung, that then*, &c. the defendants *pleaded that they and their teſtator had performed, and ſhewed how*, which was *found againſt them*. Dyer held, that for this falſe plea of the executors judgment ſhould be againſt them de bonis propriis. Mo. 69, 70. pl. 188. Trin. 6 Eliz. Anon. Dal. 70. pl. 44. S. C. in totidem verbis.

22. W. brought debt againſt R. as executor, and had *judgment de bonis teſtatoris*, and a fi. fa. was awarded. The ſheriff returns nulla bona, whereupon the *plaintiff ſurmiſed that the defendant had waſted the goods*, and prayed a ſci. fa. againſt him, to ſhew cauſe why he ſhould *not have execution de bonis propriis*. It was awarded that he ſhould have no ſuch execution *till the ſheriff had returned a devaſtavit*. Noy, 7. Williams v. Roberts.

23. The *plaintiff recovered a judgment againſt the executor for 60 l. de bonis teſtatoris, and 6 l. for damages, & ſi non, &c. de bonis propriis*, and upon a *fi. fa. the ſheriff returned nulla bona*. Afterwards,

*upon a teſtatum that the executor had aſſets in L. which he had waſted, a ſpecial fi. fa. was awarded* to the ſheriff, who *returned an inquiſition that he had aſſets the day of the writ purchaſed and had waſted them.* * Upon demurrer it was reſolved that this return and inquiſition by the ſheriff ſhall not conclude him, but that *he may well traverſe it*, becauſe otherwiſe he ſhould be without remedy; for he cannot have an action againſt the ſheriff, becauſe he returned nothing but what was found by the jury, and an attaint lies not becauſe it is only an inqueſt of office, and he is brought in by ſci. fa. to anſwer, and other anſwer he cannot have. Cro. E. 859. pl. 30. Mich. 43 & 44 Eliz. C. B. Gybſon v. Brook.

24. If *on a judgment againſt executors the ſheriff returns nulla bona, &c. upon the ſcire facias*, the plaintiff may have a ſpecial writ of fieri facias, viz. that the ſheriff levy the debt of the goods of the teſtator, et ſi ſibi conſtare poterit that the *executors* have *waſted the goods*, then de bonis propriis. 5 Rep. 32. Hill. 45 Eliz. B. R. Pettifer's caſe.

25. The *teſtator got judgment in debt* and died, and his *executor acknowledged ſatisfaction*; afterwards the judgment was reverſed, *and reſtitution awarded de bonis teſtatoris, & ſi non, &c. de bonis propriis.* Ley Ch. J. ſaid, that it is a miſchievous caſe both ways; for if it ſhall be de bonis teſtatoris tantum, then he who paid the money upon the erroneous judgment ſhall not perchance have reſtitution, viz. if the executor has not aſſets. But if it ſhould be the other way de bonis propriis, then the executor is at great miſchief; becauſe in ſuch caſe when he recovers it is aſſets to other debts, and liable, ſo long as the judgment remains in force, to pay it; and when he has paid, if the judgment be reverſed, and he has no other aſſets to pay, that he ſhall make reſtitution of his own goods. 2 Roll. Rep. 400. Mich. 21 Jac. B. R. Nelſon v. Powell.

26. *Executor* of land for a term, where the teſtator had covenanted to repair during the term, was *ſued for not repairing in the time of the executor*, and found againſt him, the judgment ſhall be de bonis teſtatoris de damnis, ſi habet; if not for the coſts of ſuit de bonis propriis; but where an executor *pleads ne unques executor, or a falſe releaſe made to himſelf*, and it is found againſt him, where the king has a fine, in theſe two caſes only the judgment ſhall be de bonis teſtatoris ſi habet, if not, for the whole de bonis propriis, in odium ſpoliatores. Jenk. 320. pl. 23.

27. In *debt againſt executors*, if the *plaintiff had judgment againſt the defendant and ſued a levari facias de bonis teſtatoris*, and the ſheriff thereupon *returns a devaſtavit*, the better form is upon that to award a *ſci. fa.* againſt the executors *before a fi. fa. ſhall iſſue of their own goods*; for that writ of execution is warranted by the firſt judgment, which was of the goods of the deceaſed only. Per Hutton J. but he ſaid, that if there be iſſued a fi. fa. de bonis teſtatoris ſi habuerint & ſi devaſtaverint de bonis propriis, then he would agree that thereupon ſhall iſſue a capias ad ſatisfaciendum againſt the executors. Hetl. 110. Trin. 4 Car. C. B. Thompſon v. Thompſon.

28. *Scire facias againſt an executor, with a fi. fa. to levy the debt and damages de bonis teſtatoris ſi tant', & ſi non, then the damages de bonis propriis.* The *ſheriff returned that the executor had nulla bona, but that he had levied the damages de bonis teſtatoris;* whereupon iſſued another fi. fa. ſuggeſting a devaſtavit, and the ſheriff returned that he had waſted, &c. which being traverſed the plaintiff had a verdict, but the judgment was ſtayed per tot. Cur. for the return upon the firſt writ was naught, becauſe the goods of the teſtator ought to be charged with the debt, and not with the damages, unleſs there are ſufficient to anſwer both; but the damages are to be levied on the goods of the executor for the delay; and though the trial and verdict be upon the return of the ſecond writ, [394] and the firſt admitted good and accepted by the plaintiff, and that it is for defendant's advantage to have the coſts levied of the teſtator's goods, yet all the proceedings upon the ſecond writ being founded upon the return of the firſt, and that being naught, all the reſt is likewiſe naught. Lev. 7. Mich. 12 Car. 2. B. R. Herne v. . . . . .

29. In *debt* againſt executors *in the detinet only, there can be no judgment de bonis teſtatoris by reaſon of the devaſtavit, nor de bonis propriis*, becauſe in the detinet only. 3 Keb. 463. pl. 42. Paſch. 27 Car. 2. B. R. Hinchman v. Kendal.

## (G. b) Judgment [againſt Executors, in what Caſes] de Bonis propriis.

1. *DEBT in the detinet againſt adminiſtrators, who by deed indented had retained the plaintiff to be ſervant to the inteſtate for* 100 *marks per ann.* the plaintiff ſhall recover againſt the defendant by reaſon of his own deed, notwithſtanding that *as to the inteſtate it was but a ſimple contract*, &c. and ſo he recovered by judgment and had elegit. Quod mirum! Br. Elegit, pl. 4. cites 46 E. 3. 10.

2. In action brought on *aſſumpſit of teſtator*, judgment ſhall be of the *teſtator's goods*, if on the *aſſumpſit of executor* of the *goods of executor*. Per Kemp Secondary, and Wray J. held that it ſhould be de bonis propriis, but the judgment given was general. Le. 94. pl. 121. Hill. 30 Eliz. B. R. Howel v. Trevanian. Cro. E. 91. pl. 18. Tovannion v. Howell, S. C. adjudged, abſente Wray, that the judgment be affirmed; for it was a good aſſumpſit, and he ſhall be charged de bonis propriis, being of his own promiſe. ——— S. P. on a writ of error out of C. B. and it was argued, that upon an aſſumpſit by executor judgment always is de bonis propriis; for it is all one as if the executor had given bond for the money, and cites S. C. and Cro. E. 406. and 9 Rep. 93. and by Parker Ch. J. the naming him executor is ſurpluſage, becauſe it appears on the face of the record that the demand was a demand againſt him on his own contract. In effect the forbearance is the conſideration of this promiſe, becauſe without forbearance no advantage can be taken of it, and cited 10 W. 3. Yard v. Ellard. And to this opinion the reſt of the Court inclined; ſed adjornatur. 10 Mod. 254. Trin. 13 Ann. B. R. Johnſon v. Gardiner.

And it is all one as if he had given bond for the money. Cro. E. 406. pl. 17. Trin. 37 Eliz. B. R. Wheeler v. Collier. ——— Mo. 519. pl. 575. S. C. but the Court ſeemed to be divided, viz. Fenner and Popham that it ſhould be de bonis teſtatoris, and Gawdy and Clench e contra, and Kemp ſaid, that ſo are all the precedents.

3. The plaintiff *recovered againſt the defendant as executor* of S. and *upon a fieri facias a devaſtavit was returned;* and upon this he

prayed an *elegit*, & habuit *de terris executoris*. Cro. E. 216. pl. 12. Hill. 33 Eliz. B. R. Mead v. Cheyney.

4. Where executor or adminiſtrator is *charged on his own promiſe*, judgment ſhall be de bonis propriis; for it is his own act. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in Scace.

The caſe in Godb. 178. is, if debt be brought againſt an executor, who pleads that he has fully adminiſtered, and it is found that he has aſſets to 40 l. whereas the debt is 60 l. that a judgment ſhall be given for * the 60 l. againſt the defendant, and upon that judgment, if more aſſets come after to the executor's hands, the plaintiff may have a ſcire facias.

5. *Debt* againſt an executor *for* 40 *l.* who pleaded *plene adminiſtravit*, and the jury *found* that he had *aſſets to* the value of 20 *l. and damages to* 5 *l.* adjudged that the plaintiff in this caſe ſhall have judgment *de bonis teſtatoris as to the* 20 *l.* and *de bonis propriis as to the damages*, and that a capias ad ſatisfaciendum lies againſt him for the damages. Nelſ. Abr. 176. pl. 8. cites Godb. 178. pl. 250. Mich. 8 Jac. C. B. Newman v. Balingſton.

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6. Debt upon a *leaſe made to the teſtator*, and an *obligation to perform covenants in it*, the breach was aſſigned in the time of the executor for *not repairing a houſe*, and the judgment was, quod recuperet, the debt de bonis teſtatoris, &c. & ſi non, &c. tunc de bonis propriis. Reſolved, the executor is chargeable in debt by the covenant made by the teſtator, and therefore ſhall be charged only for the principal with the goods of the teſtator, and *by no act or falſe plea ſhall he be charged de bonis propriis, but where he pleads the falſe plea of ne unques executor*. Cro. J. 647. pl. 15. Mich. 20 Jac. B. R. Bull v. Wheeler.

2 Roll. Rep. 292. S. C. accordingly.

7. *Judgment againſt* the *inteſtate*, and upon a *ſcire facias againſt* his *adminiſtrator*, to ſhew cauſe why the plaintiff ſhould not have execution, the ſheriff, upon an inquiſition, returned nulla bona, and the truth was, the adminiſtrator *had goods of the inteſtate*, &c. but that he kept them ſo privately, that the *ſheriff could not find them to levy the debt*, &c. It was the opinion of Ley Ch. J. and Doderidge, contra to Haughton J. that an action on the caſe upon this matter will lie againſt the adminiſtrator; but adjornatur. Godb. 285. pl. 408. Paſch. 21 Jac. B. R. Yates v. Alexander.

8. In action of covenant for *breach of covenant ſince teſtator's death*, judgment muſt be, as it ſeems, againſt executor's own goods. Went. Off. Ex. 194.

Saund. 306. S. C. adjudged that the plaintiff have execution de bonis propriis. —Sid. 412. pl. 9. S. C. adjudged for the plaintiff. —2 Keb. 488. pl. 34. S. C. and per Cur. it is the defendant's own fault

9. Upon a *fieri facias to levy a debt recovered againſt an executor*, the *ſheriff returned nulla bona*; whereupon, *after a teſtatum*, &c. *a writ was awarded to the ſheriff to inquire*, &c. *who returned*, that goods to the *value of the debt came to the executor's hands, & elongavit, vendidit diſpoſuit & ad proprium uſum ſuum convertit*; and *iſſue was taken* by the party, who came in upon a ſcire facias, quod non elongavit, &c. and the jury *found for the plaintiff*; and it was moved by Sanders, in arreſt of judgment, that there was no proper iſſue, neither did it appear that there was any devaſtavit; for the executor may eloign and ſell the goods; therefore the return and iſſue ought to have been quod devaſtavit. Sed non allocatur, for this tantamounts; and the precedents are ſo; as it is a good warrant for a capias in withernam, when the ſheriff returns,

turns, that the defendant in the replevin hath eloigned the beasts; so the executor ought to be charged de bonis propriis upon his return. Vent. 20. Pasch. 21 Car. 2. B. R. Merchant v. Driver.

to take such an issue; for he might have taken issue that he had not goods to the value, or that he had paid any special debt, and the inquisition that he had eloigned and converted to his own use is a sufficient inquest without the word devastavit, and judgment for the plaintiff. ——— Vent. 221. Trin. 24 Car. 2. B. R. in case of Blackamore v. Harris. S. P. Hale Ch. J. said, that anciently when the sheriff returned a devastavit which was not found by inquisition, and to which there was no answer, it was necessary to insert the word devastavit. But otherwise on a return upon this special writ; for if the case be that he had not wasted the goods, but only eloigned them so as the sheriff cannot come at them, the executor is chargeable upon this writ, and this return answers the writ. ——— 2 Saund. 402. Blackmore v. Mercer. S. C. adjudged for the plaintiff. ——— 3 Keb. 62. pl. 49. S. C. adjudged for the plaintiff.

10. Although an administrator or executor, after the death of the testator, *may waive the occupation of a term*, and then they shall be chargeable no farther than they have assets; *yet if they do possess the term, they shall be chargeable for the rent de bonis propriis*, if it incurs *in their own times*. Freem. Rep. 172. in pl. 183. Trin. 1674. C. B. Sackville v. Evans.

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11. In *assumpsit* the plaintiff *declared, that the intestate was indebted to him, and that the administrator, in consideration that, at his request, the plaintiff had accounted with him, whereupon there appeared to be so much due, and the defendant promised to pay it; and* the *plaintiff had a verdict and judgment to recover de bonis propriis*, which was assigned for error, but resolved that it was not; for the plaintiff was not bound to account with the executor, and his doing it was at the executor's request. And per Hale, though a bare account will not bind an executor to pay de bonis propriis, yet a promise on consideration of forbearance will, and the case here is all one; for it ought to be intended that an express request was made to account, and thereupon an express promise to pay, otherwise the evidence would not maintain the declaration, and therefore judgment in C. B. was affirmed, per tot. Cur. 2 Lev. 122. Hill. 26 & 27 Car. 2. B. R. Hawes v. Smith.

Vent. 265. S. C. the Court said, that after a verdict they must intend an express promise. But Hale said, that if upon the evidence it had appeared that there was no intention to alter the nature of the debt, as if the executor should say, stay a while until the testator's estate is come in, and I will pay you, he should direct the jury to find against the plaintiff, that would in such case charge an executor in his own right. ——— 3 Keb. 336. pl. 41. S. C. adjudged for the defendant.

12. Error upon a judgment in C. B. where *judgment was* given *against Green and his wife, and Brook and his wife;* and scire facias, and inquiry granted on suggestion, that the defendants, being executors, had wasted; and the *sheriff returned, that Brook and his wife devastaverunt; but as to Green and his wife, nothing is said;* and upon this judgment is given against Green and his wife, de bonis testatoris; and against Brook and his wife, de bonis testatoris si tantum, si non de bonis propriis; upon which error is brought and assigned, that nothing being returned as to Green and his wife, the judgment is given without warrant, and the writ not being executed according to the suggestion of it, which is of a joint devastavit, and the return being only of a devastavit by Brook and his wife, this is a void return; as a verdict is void that finds but part of the issue, and says nothing as to the residue; and though it was objected that this is a mis-return, aided by the sta-

S. C. cited Ld. Raym. Rep. 328.

tute of jeofails, and 1 Cro. Eyres and Taunton's caſe, and other caſes cited to this purpoſe, yet the Court ſeemed e contra, and that there was no warrant to give judgment upon this record againſt Green and his wife; and therefore judgment againſt them not good. Skin. 571. pl. 15. Mich. 6 W. & M. B. R. Brook v. Ellis.

13. Upon a return of a *devaſtavit*, execution ſhall be de bonis propriis, and *not a conditional one*, and it is never otherwiſe; and the *reaſon is*, that when a fieri facias goes, it is de bonis teſtatoris; and if the ſheriff finds no goods of teſtator, and is ſatisfied of a devaſtavit, he cannot execute the writ of the goods of the executor, but ought to return the truth, a devaſtavit, and then he ſhall have power to make execution de bonis propriis. Per Holt Ch. J. 12 Mod. 412. Trin. 12 W. 3. in caſe of Rook v. the Sheriff of Saliſbury.

14. If *two actions* are brought againſt an executor of 100*l.* *each*, and he has *aſſets only for one*, and he pleads *plene adminiſtravit to both, and then pays off one, and ſuffers the other to go by default*, he ſhall anſwer de bonis propriis for it; per Holt Ch. J. 12 Mod. 412. in caſe of Rook v. the Sheriff of Saliſbury.

15. *And ſo* if there were 10 *actions*, and he pleads plene adminiſtravit to all, and after pays off one, which is all he has, and then ſuffers judgment to go by default, he ſhall be charged with all the reſt de bonis propriis. Per Holt Ch. J. 12 Mod. 412. in caſe of Rook v. the Sheriff of Saliſbury.

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16. *Leſſee for years covenanted for himſelf, his executors, and aſſigns, to* repair; the leſſor brought an action of *covenant againſt the adminiſtrator, and ſhewed that ſtatus de & in præmiſſis came to the defendant, and that he entered, and after that the premiſes were in decay, and he had not repaired*; it was inſiſted, that this covenant runs with the land, and binds the aſſignee, and that the defendant was adminiſtrator, and that where he anſwers as aſſignee, the judgment againſt him is de bonis propriis; but where he anſwers as executor, the judgment againſt him is de bonis teſtatoris, though the breach be in his own time. Judgment niſi for the plaintiff, no counſel attending on the other ſide. 1 Salk. 309. Paſch. 12 W. 3. B. R. Tilney v. Norris.

Carth. 517. S. C. held accordingly. —— Ld. Raym. Rep. 553. S. C. held accordingly. —— Where defendant is charged as executor, judgment ſhall be de bonis teſtatoris, though he might have been charged as aſſignee. 1 Salk. 316. pl. 25. Trin. 9 Ann. B. R. Buckley v. Firk.

17. Plea in debt was of payment of a judgment, &c. replication was, that it was per fraudem. On iſſue, verdict was for the plaintiff; a fieri facias iſſues de bonis teſtatoris, &c. The *ſheriff returns a devaſtavit*, then iſſued a fieri facias againſt the executor de bonis propriis et bene, though objected that the ſheriff ought to have found an inquiſition of a devaſtavit, and thereupon a ſcire facias ought to iſſue againſt the defendant. Mich. 8 Ann. C. B. Read v. Bingham.

## (H. b) Where an Executor or Adminiſtrator is Debtor to his Teſtator or Inteſtate, the Effect thereof.

1. DEBT *againſt two executors*; the defendants *ſaid, that the teſtator had made them and one Alice his executors, who had adminiſtered* judgment of the writ; for *ſhe is alive, not named*; the *plaintiff, by proteſtation that Alice did not adminiſter, ſaid that he took her to wife*; and it ſeems there, that if ſhe had adminiſtered, the duty had been gone. Br. Dette, pl. 65. cites 11 H. 4. 83.

2. *Debt by executor of W. S. againſt executor of J. N.* who *ſaid, that the teſtator of the plaintiff made his teſtator his executor with the plaintiff, at ſuch a place*, and died; judgment ſi actio. And by the beſt opinion, *if the teſtator of the defendant had adminiſtered*, or taken upon him, &c. the debt is extinct. Br. Executors, pl. 112. cites 8 E. 4. 3. S. C. cited Arg. Hutt. 128.—— S. C. cited per Cur. in the third reſolution in Needham's caſe.

8 Rep. 136. a. Paſch. 8 Jac. C. B. that it is a releaſe in law of the debt; for it is by the act of the obligee himſelf.

3. Debt *by executors of A. againſt the executors of B.* the *defendant ſaid, that the teſtator of the defendant was indebted to the teſtator of the plaintiff in the ſum that*, &c. *and he made the teſtator of the plaintiff and the teſtator of the defendant his executors*, and died, *and the teſtator of the defendant adminiſtered; judgment ſi actio*; per Brian Ch. J. it is a good plea; for where a man makes his debtor, and another his executors, and dies, and the debtor makes his executor and dies, and the other executor who *ſurvives ſhall not have the action* againſt the executor of the debtor, *though the debtor did not adminiſter* in his life; *for the action was once extinct* before; for the action *cannot be brought before, but in the names of both the firſt executors*, notwithſtanding that the other did not adminiſter. Br. Executors, pl. 114. cites 20 E. 4. 17. S. C. cited Arg. Hutt. 128.

4. *But* if a man *makes* his debtee, viz. his *creditor and another his executors*, and dies, there, if the *debtee does not adminiſter*, he may have action, and ſo may his executor, if he dies; for in this caſe *the action was not extinct*; quod tot. Cur. conceſſit; for I may releaſe my own debt; but it is no reaſon that my debtor ſhall determine the debt which he owes me, without act or folly in me. Ibid. [ 398 ]

5. If *three are bound* to a man, *conjunctim and diviſim*, and the *obligee makes the one of the three* obligors *his executor*, and dies; this is a releaſe in law, and diſcharges all, notwithſtanding it be joint and ſeveral; for judgment and execution againſt the one is a diſcharge againſt all. Br. Executor, pl. 118. cites 21 E. 4. 81.

6. J. H. *makes the obligor and others his executors*, and the *obligor refuſes*, but the *others adminiſter*, and the *obligor dies firſt*, yet *the debt is releaſed*; and the only reaſon of that muſt be, that *the refuſal was void*, and the obligor might have come in and adminiſtered,

ſtered, notwithſtanding; for the probate by the other executors is for his benefit. Per Holt Ch. J. Salk. 308. Mich. 11 W. 3. C. B. in caſe of Wankford v. Wankford.

7. A. makes a *feoffment, on condition* that if A. *pay* 20*l. to B.* before Mich. *or to his executors or aſſigns*, that then *he may enter*; feoffor before Mich. makes *B. executor*, and by the ſame teſtament gives all his goods and chattels to his wife; per three juſtices againſt one, this was thought no *releaſe*, ſo that payment ought to be made to the wife. Mo. 58. pl. 166. Paſch. 6 Eliz.

8. In *debt by an executor*, the *defendant pleaded that the plaintiff was cited before the ordinary to prove the will* of the teſtator, *and* that he *made default*; and *thereupon adminiſtration was granted to the defendant, by virtue whereof he did adminiſter, and ſo the debt became extinct*; but adjudged, that *by the plaintiff's probate of the will, after the adminiſtration was granted to the defendant, that adminiſtration was defeated*; and that though the executor did make default at the day on which he was cited, yet he might prove the will at any time when he would. But *if he had appeared, and renounced the executorſhip*, it had been otherwiſe. Le. 90. pl. 115. Mich. 29 & 30 Eliz. C. B. Baxter v. Bale.

9. Debtee makes *debtor and another* executors, and the *debtor dies*, the ſurviving executor may have action of debt againſt the executor of debtor, per Cur. Le. 320. pl. 448. Mich. 30 & 31 Eliz. B. R. in caſe of Croſſman v. Read.

The debt is extinct, Arg. Pl. C. 36.——Went. Off. Ex. 31. ſays it cannot be that the ſurviving executor may ſue the executor of the debtor executor deceaſed, for the debt was utterly extinct by the making him executor, as if the teſtator had releaſed it to him, yea though he had died before he did ever adminiſter or prove the will.——Debtor did not adminiſter, yet it is a releaſe. 1 Salk. 307. in Wangford's caſe, cites 20 E. 4. 17. & 21 E. 4. 3.——Went. Off. Ex. 30. ſays the making debtor executor is a releaſe in law.——Ibid. 141. S. P.

10. Debtee makes *debtor and another executor, and directs a legacy to be paid out of the debts*; per Cur. though the joint executor has no remedy to recover this debt againſt the plaintiff his co-executors, nor no action can be had for it in the life of the executor debtor, yet the debt is not extinct, but remains aſſets to ſatisfy debts, and alſo the legacy which is expreſsly given to be paid out of it. Yelv. 160. Mich. 7 Jac. B. R. Fludd v. Rumſey.

Jo. 345. S. C. adjudged.——S. C. cited Hutt. 128. in caſe of Alſton v. Andrew.——Holt Ch. J. in delivering his opinion, 1 Salk. 305. in the caſe of Wankford v. Wankford, ſays that the ſame point was reſolved, Hill. 24 & 25 Car. 2. B. R. in caſe of Lock v. Croſs.

11. *Executor of one of the obligors*, but *without aſſets*, was *executor to obligee*; this is no diſcharge, becauſe though as executor of obligee he is the perſon to receive, yet, by having no aſſets of the obligor's, he is not the perſon to pay; but if the *executor of the obligee is executor to one of the obligors, and has aſſets* of the obligor, the debt is extinct, and the executor cannot ſue the other obligor; for the *having* aſſets amounts to payment*; per Holt Ch. J. 1 Salk. 305. cites Cro. C. 372. [pl. 7. Trin. 10 Car. B. R.] Dorcheſter v. Webb. and Jo. 345. S. C.

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Cro. C. 373. S. C.——S. C. cited

12. Obligee makes *one of the obligors his executor*; the debt is not diſcharged, for there he has the debt *en auter droit*, and may ſue the

the ſurviving obligor, eſpecially when he had adminiſtered all the goods of the obligor before he was made executor by the obligee; reſolved Jo. 345. Trin. 10 Car. B. R. Dorcheſter v. Webb. 12 Mod. 190.

13. If the ordinary grants adminiſtration to the debtor, the debt is not extinct. 8 Rep. 136. a. Paſch. 8 Jac. C. B. The third reſolution in Sir John Needham's caſe. S. C. cited by Holt Ch. J. 1 Salk. 306. in caſe of Wankford v. Wankford. ——Obligor took out adminiſtration, and made his executor and died. A creditor of the obligee brought debt againſt this executor, and held that it well lies. Sid. 79. pl. 3. Trin. 13 Car. 2. B. R. Lockier v. Smith. ——Keb. 313. pl. 33. S. C. adjudged.

14. The defendant gave bond to teſtator, and afterwards the teſtator made *obligor executor*, whereupon defendant inſiſts that the bond is thereby diſcharged in law; per Cur. though the bond was diſcharged in law, yet in equity defendant ought to account for the *arrears of rent ſecured by the bond.* Ch. R. 242. 15 Car. 2. Field v. Clerk. Obligee makes obligor executor, who agrees to it; the defendant is diſcharged by the rule that action perſonal ſuſpended is gone for ever. Jo. 345. Dorcheſter v. Webb. ——Cro. C. 373. S. C.

15. *A. and B. are obliged to C.; A. dies, and makes D. his executor; D. dies, and makes C. his executor;* C. ſues B. for the debt, B. pleads the matter above, and ſays, that diverſa bona & catalla of A. (the firſt teſtator) came to the hands of C. but it was ruled againſt B. becauſe he did not ſay, ad valentiam debiti, and perhaps the goods were but of the value of 6d. Freem. Rep. 49. pl. 59. Mich. 1672. C. B. Anon.

16. If executor debtor * *refuſes*, the adminiſtrator may ſue him; Arg. But Twiſden J. denied it, becauſe a perſonal action once ſuſpended is ever ſo. Vent. 303. Hill. 28 & 29 Car. 2. B. R. in caſe of Abram v. Cunningham. * In ſuch caſe the debt remains. 11 Mod. 39. 42. in caſe of Wangford v. Wangford.

17. A *mortgagee* of lands made the *mortgagor executor*; but this being done *by circumvention* and contrivance of the mortgagor, and in prejudice of the mortgagee's own child, an infant, and having burned the mortgage deed, wherein he pretended were ſome things contained to his advantage, he was decreed to account for the money in diſcharge of debts, and the cuſtody of the infant taken from him. Fin. Rep. 351. Paſch. 30 Car. 2. Corcellis v. Corcellis.

18. Nota, one *J. B. being in execution, the plaintiff died inteſtate, and the right of adminiſtration came to her*, and a motion was made for a habeas corpus to bring her from the compter into this court, for that having adminiſtered to her creditor, ſhe might be diſcharged; but it was denied, for ſhe could not be thus diſcharged, becauſe non conſtat de perſona, neither can ſhe give a warrant of attorney to acknowledge ſatisfaction; therefore *let her renounce the adminiſtration and grant to another, and then ſhe may be diſcharged by a letter of attorney from ſuch adminiſtrator.* 2 Mod. 315. Trin. 30 Car. 2. B. R. Bailey's caſe. [ 400 ]

19. *Obligee*

19. *Obligee makes the obligor executor in truſt for his children, &c.* though this be in law an *extinguiſhment* of the debt, yet in equity it is not, but it ſhall be preſerved in being for the benefit of the ceſtuy que truſt. 2 Freem. Rep. 52. pl. 58. Paſch. 1680. Anon.

20. Debt upon bond by the plaintiff, as executor of the obligee, the defendant pleaded, that the *obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of ſeventeen.* The plaintiff demurred; per Curiam, this cannot be a ſuſpenſion of the action, becauſe the defendant was only executor in truſt for the plaintiff during minority. Adjornatur Ld. Raym. Rep. 605. Mich. 12 W. 3. B. R. Caweth v. Philips.

## (I. b) Where Debtee or Creditor is Executor to Teſtator. The Effect thereof.

1. IF debtor makes his *creditor executor*, and he *adminiſters*, the debt is extinct. *So if creditor makes debtor* his executor. Per Hank. Br. Dette, pl. 65. cites 11 H. 4. 83.

Debt againſt the heir, it is a good plea that the anceſtor made the plaintiff his executor, who adminiſtered. Br. Dette, pl. 68. cites 12 H. 4. 21.

2. *Debt againſt the heir* of J. N. who *ſaid, that his anceſtor made the plaintiff his executor, who retained ſo much as the debt amounted to.* Judgment ſi actio. And per Hill, an executor, to whom the teſtator was indebted, may pay himſelf; but Brook ſays, the contrary ſeems to be law; for if he adminiſters as executor, the debt is determined, and therefore the iſſue was there taken, if the executor had adminiſtered or not as executor. Br. Executor, pl. 59. cites 12 H. 4. 21.

3. If *obligee marries one of the executors of obligor*, who *adminiſtered*, his action is gone; but if ſhe did not adminiſter, his action remains, becauſe he may have action againſt the other that did adminiſter, not naming his wife; Arg. Pl. C. 184. b. Trin. 5 Mar. 1. in caſe of Woodward v. Darcey.

Hutt. 128. cites 8 E. 4. 3. 21 E. 4. 2. Litt. 264. b. 20 E. 4. 17.

4. Debtor makes *debtee and another* executors, and the * *debtee does not adminiſter*, but dies, his executor ſhall have action againſt ſurviving executor; but if he † adminiſters, it is otherwiſe; Arg. Pl. C. 184. b. Trin. 5 Mar. 1. in caſe of Woodward v. Darcey, cites 21 E. 4. 3.

—— * So if debtee executor refuſes. Jo. 345. Dorcheſter v. Webb. —— Cro. C. 372. S. C.

† For then the debt is diſcharged. Jo. 345. Dorcheſter v. Webb. —— S. C. cited Hutt. 128. —— But in ſuch caſe the obligee may retain ſo much as his debt is. Jo. 345. S. C. —— Went. Off. Ex. 32. ſays, let it be well adviſed of, whether if he do adminiſter at all, and eſpecially if he pay himſelf any part, he has not thereby barred or diſabled his ſuit for the reſidue. —— If he pays himſelf any part out of the goods he cannot ſue the heir for the reſt, becauſe the debt cannot be apportioned; but otherwiſe he may, ſaith the book 12 H. 4. yet quære if he takes on him the executorſhip and have goods ſufficient to pay all. Went. Off Ex. 93.

5. Where the *obligor makes the obligee his executor, the debt is not extinct, but only upon a ſuppoſal that the executor has aſſets which he may retain* to pay himſelf; but in caſe of failure of aſſets, the executor

cutor may ſue the heir at the very day. 1 Salk. 304. per Powell J. and cites 12 H. 4. 21. and Pl. C. 185.

* 6. The *principal debtor by bond made his ſurety* in the ſame bond *executor*, and died; the ſurety paid the money generally; and whether it ſhall be ſaid that he paid as executor or as obligor was a quære not reſolved by the Court. 3 Le. 197. pl. 248. Mich. 29 Eliz. B. R. Carter v. Martin. 4 Le. 4. pl. 17. S. C. and left a quære.

7. Where the ſurety was *adminiſtrator*, and paid the debt, it was adjudged he was not relievable; becauſe, by joining with the principal, the debt became his own debt. 4 Le. 236. pl. 373. Mich. 5 Jac. C. B. Anon.

8. If the obligor *makes the executor of the obligee his executor, and leaves aſſets*, the debt is preſently ſatisfied by way of retainer, adjudged. Hob. 10. pl. 20. Hill. 11 Jac. Fryer v. Gildridge. Mo. 855. pl. 1174. Fryer v. Gildridge. S. C. adjudged.

9. If *A. promiſes B. to give C. as much as he ſhall give to any of his kin*, and afterwards *A. makes C. his executor*, and dies, this is no performance of the aſſumpſit, inaſmuch as C. has this as executor. It was ſo ſaid, Sid. 25. Hill. 12 Car. 2. C. B. in the caſe of Shipſton v. Booler.

10. *One obligor makes obligee executor*; obligee may ſue the other, if not fully ſatisfied by the adminiſtration. 2 Lev. 73. Mich. 24 Car. 2. B. R. Cock v. Croſs.

11. Obligor makes the *obligee executor; executor dies, and leaves A. executor*. A. brings debt againſt the obligor's heir, and held good per omnes; for the debt is not extinguiſhed, but only ſuperſeded as to the executor. 2 Show. 401. pl. 273. Mich. 36 Car. 2. B. R. Pidgeon v. Pitts. 1 Salk. 304. S. P. in caſe of Wangford v. Wangford.

## (K. b) Where Executor is Legatee. How he ſhall take, whether as Executor or as Legatee.

1. A Man made his will, and *gave divers legacies*, and in the end of it, he *gave all the reſt of his goods to his wife, whom he made his executrix, to pay his debts; ſhe took huſband, who made the defendant his executor, and died, againſt whom the wife executrix brought detinue of the goods of her firſt huſband*, and adjudged maintainable; becauſe ſhe took the goods, not as legatee, but as executrix, by reaſon of the words, viz. (to pay his debts). Mo. 98, 99. pl. 242. Mich. 15 & 16 Eliz. Huncks v. Alborough. Pendl. 219. pl. 252. the pleadings and judgment for the plaintiff. —— And. 22, pl. 45. S. C. adjudged accordingly. —— D. 331. a. pl. 21. S. C. adjudged for the plaintiff.

2. A. ſeiſed in fee deviſed the *land to B. for 31 years*, to the intent *to pay certain debts and legacies*, and made B. executor; but if B. died within the term, then A. willed that C. ſhould have ſuch term, &c. and then alſo be executor; per Gent J. B. has the term as executor, and is not like a term deviſed, which the party has as legatee, and B. has only authority in this term as executor, and the land is tied to the time and the authority, and when the ſame determines in his perſon, then the land departs from him to C. who

who is ſpecial executor to that purpoſe as B. was before. 3 Le. 112. pl. 159. Trin. 26 Eliz. Vincent Lee's caſe.

Cro. E. 92. pl. 21. Broker v. Charter, S. C. held accordingly. —Ow. 44. S. C. and it was ſaid by Ford Dr. of the Civil Law, that if legatees being executors refuſe to prove the will, yet by the civil law they ſhall have their legacies; but the Court adjudged contra; for by the refuſal it is a dying inteſtate, and then nothing could be deviſed. —— Le. 135. pl. 185. Sir Henry Goodier's caſe, S. C. but S. P. does not clearly appear, but ſeems to be admitted.

3. A. made ſeveral executors, and deviſed a *term to one of his executors*; they *all renounced the executorſhip*; after the executor, * deviſee of the term, entered on the lands, and granted the term to another; but adjudged void, becauſe he had refuſed, and he cannot once refuſe, and after take on him the executorſhip. Mo. 273. pl. 246. Hill. 31 Eliz. C. B. Bewacorne v. Carter.

4. If a *term* be deviſed to an executor, the *remainder over*, and the executor enters generally, this ſhall be taken as a deviſe, for it is more for his benefit. Cro. E. 223. pl. 3. Paſch. 33 Eliz. B. R. Truſloe v. Ewers.

4. Eſpecially if it be not alleged in fact, that all the debts are paid; per Anderſon and Periam J. and Anderſon doubted if ſuch allegation be ſufficient. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. Cheney v. Smith.

But if the entire term be given to his executor, then the general entry executes the term in them as a legacy, for there is no miſchief; but where a particular intereſt is given, and the reſidue to another, it is otherwiſe, except there is an expreſs declaration of their intent: for otherwiſe they ſhall be charged for the reſidue as a devaſtavit, which the law will not enforce. Ibid.

6. Deviſe of a *term* to B. and C. *till his debts and legacies are paid*, and after to A. and makes B. and C. his executors; they take the term as executors; for no more is given to them by the will than the law gives to them as executors, and then the deviſe is void, and they take as executors, for being given to them till debts and legacies are paid, this the law willeth. Cro. E. 347. Mich. 36 & 37 Eliz. B. R. Pannell v. Fenn.

7. A. deviſed a *term for years to his ſon after the death of his wife*, the executor ſhall have it in the mean time, and not the wife *by implication*, but they ſhall take it, not as legatories, but to perform the will; per Popham Ch. J. Cro. J. 74. pl. 4. Trin. 3 Jac. B. R. Horton, alias Burton, v. Horton.

Hutt. 36. Blackburn's caſe. S. C. accordingly, and that here was no default in the wife, for it is the act of God, and therefore judgment for the plaintiff. —— Brownl. 79. S. C. adjudged for the plaintiff.

8. *Deviſe* of lands *to his daughter and heirs, at her age of* 18, *and that his wife ſhall take the profits in the mean time, provided ſhe keeps the daughter at ſchool, &c. The widow marries again, and dies, the daughter not being* 18. Adjudged that this was a plain term given to the wife for her own uſe; which accrues to the huſband, and the keeping and educating the daughter is not of ſuch a particular privity, but that it may be performed effectually by another. Hob. 285. pl. 370. Trin. 17 Jac. Balder v. Blackborne.

9. If a man *wills that his wife* or any other *ſhall have*, hold, or enjoy, *the moiety of his leaſe with his executor*, this implies not that the executor ſhall have the other moiety as a legacy alſo, but otherwiſe as the law caſts it upon him. Went. Off. Executor, 254.

10. If

10. If the bequeſt be to him who is made executor, it ſhall veſt in him as legatee till election expreſs or *implied*; becauſe the law prefers debts, and the ſatisfaction of them, before legacies, and therefore transfers nothing from the executor till there appears aſſets ſufficient without it, ſo as he may not be liable to a devaſtavit. Went. Off. Ex. 27.

11. Deviſe was of a *term to executors after the death of the wife*; after the death of the wife the executors take as legatees, but till her death they ſhould have it as executors generally. Vaugh. 267. Hill. 20 & 21 Car. 2. C. B. in caſe of Gardner v. Sheldon.

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12. By making debtor executor, it is no *extinguiſhment* of the debt as to *creditors*, *legatees*, and *reſiduary legatees*. Chan. Caſes, 292. Mich. 28 Car. 2. Phillips v. Phillips.

Bond conditioned to pay 1100 l. given by one partner to the other on account of the partnerſhip, the obligee deviſed all his perſonal eſtate and debts due so him, equally to be divided between the plaintiff and the defendant the obligor, and made the defendant executor; decreed that by his being made executor this debt was not diſcharged. Fin. R. 410. Hill. 31 Car. 2. Phillips v. Phillips. ——The deviſe was, that after his debts paid, the reſidue of all his goods, chattels, debts, ſhipping, &c. ſhall be divided betwixt the plaintiff and defendant, his nephews, and makes the defendant his executor and dies; the Lord Chancellor held clearly that it ſhould not be extinct, but ſhould be caſt in with the reſidue of the eſtate, eſpecially in this caſe, where debts are particularly mentioned; and this was a debt at the time of the making of the will; and if the word debts had not been in, he ſaid he believed it would have been all one, but that made it more ſtrong. 2 Freem. Rep. 11. pl. 10. Mich. 1676. Phillips v. Phillips.

13. A. deviſed lands in the hands of his truſtees for payment of debts and legacies, and made his wife executrix, but *did not in terminis expreſsly deviſe the perſonal eſtate to her*, but only made her executrix. The perſonal eſtate ſhall come in aid of the real, as to the debts and legacies, per Ld. Chancellor; ſo was in her hands as executrix. Chan. Caſes, 297. Hill. 28 & 29 Car. 2. Grey v. Grey.

(It ſeems admitted, that if the perſonal eſtate had been in terminis deviſed to the wife that ſhe had taken it not liable to the debts and legacies, and conſequently taken it as legatee, notwithſtanding her being executrix.) Ibid.

14. Obligor is made executor to obligee, and *adminiſters ſome goods, but proves not the will*, and dies, the debt is *extinguiſhed*. 1 Salk. 299. pl. 12. in B. R. Hill. 1 Ann. Wankford v. Wankford.

11 Mod. 38. S. C.—3 Salk. 162. pl. 9. S. C. held accordingly by Holt Ch. J.——Freem. Rep. 520. pl. 695. Wangford v. Wangford. Hill. 1704. S. C. adjudged accordingly.——Unleſs there was a defect of aſſets for payment of debts; but if there were, they agreed that the debt ſhould ſubſiſt for the benefit of the creditors rather than they ſhould be defrauded. Ibid.

15. Legacy *till election* reſts prima facie in a legatee executor, not as legatee, but as executor. Arg. Chan. Caſes, 310. Hill. 30 & 31 Car. 2. in caſe of Civil v. Rich.

16. A. deviſed *his perſonal eſtate* to his wife, whom he made executrix; per Cur. ſhe takes it as executrix, and it is to be applied in diſcharge of the real. 2 Vern. 302. pl. 291. Mich. 1693. Cutler v. Coxeter.

17. A. deviſed the *ſurplus* of his eſtate, after debts and legacies, to M. his wife, and B. his eldeſt ſon, *equally to be divided* between them, and adds, *whom I make my executors; but if ſhe marry again, ſhe ſhall render the right of being my executrix to my ſon R. to be partner with his brother B. in the executorſhip*; the caſe of WILKINSON, and of

A. makes his brother executor, and deviſed to his executor all his real and perſonal

eſtate, and afterwards A. marries, and by a cod'cil makes his wife executrix; it was urged that

of CUTLER, AND COXETER, cited; where, on like deviſes, it was declared the wife ſhould take as executrix, and not as legatee; the Maſter of the Rolls thought ſhe had as well loſt her ſhare of the ſurplus as her right to the executorſhip, and diſmiſſed the bill. 2 Vern. 308. pl. 299. Hill. 1693. Barton, alias Stone, v. Barton.

he does not take it as executor only by expreſs words of gift. But per Finch, the wife ſhall have the perſonal eſtate, and not the brother, for it was intended him only as executor. Vern. 23. pl. 16. Mich. 1681. Wilkinſon v. . . . . —— S. C. cited 2 Vern. 302. in caſe of Cutler v. Coxeter.

S. C. cited per Cur. Gibb. 41. Mich. 2 Geo. 2. in Scacc.

18. A. by will *charges his real eſtate with the payment of debts and legacies, and funerals, and deviſed to his wife all his perſonal eſtate not otherwiſe diſpoſed of, whom he made executrix.* Ld. Keeper Wright before, and Cooper K. now, both held, that the deviſe being in the ſame clauſe in which ſhe was not named executrix, and not ſaid free and exempt from payment of debts, ſhe muſt take it as executrix, and the ſame muſt be applied to the payment

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of debts, in eaſe of the real eſtate. 2 Vern. 568. pl. 515. Hill. 1706. French & Ux' v. Chicheſter.

19. Bill by heir at law againſt executor, to have an account of the perſonal eſtate of his anceſtor, &c. in exoneration of the *real eſtate deviſed to truſtees to be ſold for payment of debts.* W. by will deviſes to truſtees (ut ſupra) and *gives his wife ſeveral ſpecific legacies*, and further deviſes to her *all the reſidue of his perſonal eſtate, and alſo* gives her *the ſum of* 600*l. out of the money to be raiſed by ſale of the truſt eſtate, and makes her executrix.* Harcourt Chancellor ſaid, this is a much ſtronger caſe than that of CHRIST'S HOSPITAL v. GARRAWAY, for there was no deviſe out of the perſonal eſtate; but here is that, and alſo a deviſe of the perſonal eſtate. It ſhews that he did not think this ſufficient for her, but gives her a further ſum of 600*l.* which is the ſtrongeſt preſumption imaginable of the *intent that the wife ſhould have the reſidue of the perſonal eſtate*, and as to the account thereof, the bill was diſmiſſed. 12 Ann. in Canc. Waſe v. Whitfield.

20. A. by deed ſettles his lands for payment of his debts, and after makes his wife executrix, and *deviſed all his perſonal eſtate to his executrix*, and by ſubſequent clauſes in the will deviſed *ſeveral ſpecific and pecuniary legacies to her*, and dies; adjudged that the wife takes the perſonal eſtate not as legatee but as executrix, and ſo the ſame after the legacies paid ſhall be applied to diſcharge the real eſtate in favour of the heir. But per Pengelly Ch. B. if theſe words *to her own uſe*, had been added, or ſuch like words, it might give ſome cauſe of doubt. Gibb. 41. Hill. 2 Geo. 2. in Scacc. Lucy v. Bromley.

21. A. by will *gives all his perſonal eſtate to his three ſiſters, equally to be divided* between them, *and (being indebted by ſimple contract, bond and mortgage) gives his real eſtate to his four ſons, chargeable with his juſt debts; and makes his ſiſters his executrixes.* The perſonal eſtate ſhall be applied in exoneration of the real; eſpecially as one of theſe funds muſt be exhauſted. Caſes in Equ. in Ld. Talbot's Time, 274. Mich. 1734. Bromhall v. Wilbraham.

## (L. b) What amounts to an Election to take as Executor or as Legatee.

1. IF a deviſe be to an executor *for education of children, whom he educates accordingly*, this makes an election to have the thing by way of legacy and not as executor. Went. Off. Ex. 224. cites Pl. C. 543. Paramour v. Yardley.

2. It was given in *evidence* that the wife, (who was executrix and legatee of a term of her firſt huſband,) after the death of her teſtator *had repaired the banks of the land*, as if the ſame would amount to *claim it as a legacy*; and the Court ſaid that that matter ſhould be referred to the jury; but *a leaſe made by executrix and her huſband, reciting that he was poſſeſſed in right of the wife as executrix* of her firſt huſband, was, upon producing the leaſe, held as an expreſs claim as executrix. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. Cheyney v. Smith.

3. If *executor by will bequeaths to J. S. the thing* bequeathed deviſed to him, this is an election to have it as legatee. Went. Off. Ex. 225. Marg. cites Trin. 37 Eliz.

4. Executor deviſee *of a term entered and occupied a whole year without proving the will.* Went. Off. Ex. 224. ſays, that in the latter part of Ld. Dyer it is found, that this was held an election [405] to hold it as deviſee, and not as executor; but ſays, that he ſees not well how that ſhould be law. For 1ſt, He had good right to the term as executor before probate, and ſo might clearly in that right have taken the profits, though it had not been deviſed or bequeathed to him, and that before any will proved. 2dly, He could not by right have it as legatee without *aſſent of himſelf or ſome other as executor*, therefore this *general acceptance* can determine no election. Went. Off. Ex. 224, 225.

## (M. b) When he ſhall take as Executor or as Deviſee.

1. A *Term* was deviſed to executrix, *to educate children* of teſtator, prima facie ſhe takes as executrix; but if ſhe educates the children, this is election to take by the deviſe; Arg. Mo. 493. cites [Pl. C. 539. b. Hill. 21 Eliz.] Yardley's caſe.

2. A. poſſeſſed of a *term*, deviſed the ſame *to his ſon when he came to* 18, and that *his wife ſhould have it in the mean time*, and made *her executrix, and died* before the ſon came to 18. The wife took huſband. It was held that ſhe ſhould have the term as executrix till the ſon ſhould have come to 18. 4 Le. 1. pl. 2. Paſch. 23 Eliz. Anon.

3. A. deviſed land to J. S. and J. N. upon condition, and if they perform not the condition, then that their eſtate ſhall ceaſe, and that the executors of A. ſhould have it to them and their heirs, Cro. E. 288. pl. 3. Martidale v. Martin, S. C. reſolved to be

no condition.

heirs, *upon truſt* and confidence that they ſhall ſtand ſeiſed to the ſame uſe limited to J. S. and J. N. and makes B. and C. executors, who *refuſe onus teſtamenti*; yet it was adjudged that they may take the land by the deviſe, and that the words (upon truſt and confidence) do not make condition to their eſtate. Mo. 594. pl. 806. Mich. 34 & 35 Eliz. Gibbons v. Marltiward.

Goldſb 185. pl. 125. S. C. as to the term, but ſaid nothing of the freehold, and held per Clench and Fenner J.

4. *A. ſeiſed of land, and* poſſeſſed *of a term*, deviſed all his lands and tenements to his executors *till they had paid all his debts* and legacies, &c. A. made J. S. and J. N. his executors. They *entered generally* into the land and into the term. Adjudged that they took the *term* as executors, and not as deviſees, but they took the freehold as deviſees. Mo. 350. pl. 470. Hill. 36 Eliz. Pannel v. Fenn.

that they take as executors. But by Gawdy J. if I make two my executors, and deviſe the profits of my land to them until my debts and legacies are paid, and until they have raiſed 100l. and after that to their own uſe; they ſhall take as legatees, and not as executors in reſpect of the 100l. which they are to have to their own proper uſe.——Cro. E. 347. pl. 19. S. C. adjudged.

Cro. E. 387. S. C. adjornatur.

5. Executor deviſee ſhall take a *term* as executor where he enters generally, if his being ſaid to take it as a legatee will be *prejudicial to him*, as to charge him in a *devaſtavit* for want of aſſets to pay debts, &c. otherwiſe he ſhall take it as legatee. Mo. 352. pl. 474. Hill. 36 Eliz. B. R. Portman v. Willis.

——He ſhall prima facie take as legatee, this being more for his advantage; but otherwiſe where I deviſe a term to my executor for life only, remainder to J. S. becauſe if the term were veſted in the remainderman it could not be deveſted out of him again, and ſo might make a devaſtavit. 2 Wms.'s Rep. 531. Trin. 1729. by the Maſter of the Rolls, in the caſe of Cray v. Willis.

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6. *All the reſt of my goods, my debts and legacies being paid, I give to my executor.* The teſtator had ſeveral leaſes of lands in ſeveral counties. The executor proved the will, and made *election* to have *one tenement*, part of the land, demiſed as legatee, and died. The judges delegates agreed, that the election of this one tenement was election of all, notwithſtanding the lands were ſeveral, and upon ſeveral demiſes, becauſe the deviſe is intire; and he dying inteſtate, though the debts and legacies were not paid at the time he made his election, yet adminiſtration ſhall be committed as of his own goods, and not of the goods of the firſt teſtator. 2 Roll. Rep. 158. Hill. 17 Jac. B. R. Hinſon v. Button.

7. If an executor *enters generally*, he is in as executor, and not as deviſee; per Mallet J. cites it as reſolved in Lampet's caſe, and in Matthew Manning's caſe. Mar. 136. in pl. 209. Mich. 17 Car.

8. Where teſtator *deviſed the ſurplus to his executors B. and C. after debts, &c. paid*, though it muſt be admitted, that until debts, &c. are paid, it cannot be known what the ſurplus is, yet in caſe where all the debts, &c. are paid, it may well be known what the ſurplus is, and ſo there may be an aſſent to this legacy, ſo that by the death of B. all ſhall ſurvive to C. for here is an *implied aſſent*. See 2 Wms.'s Rep. 529 to 532. Trin. 1729. by the Maſter of the Rolls. Cray v. Willis.

## (N. b) Where he ſhall take as Purchaſor.

1. *LEASE for life to A.* and *if A. died within* 12 *years*, that *his executors ſhall hold till* the end of the 12 years. A. died. The executors entered, and brought actions of covenant, which proves that the executors had the term as a chattel veſted in teſtator, and not in their own rights as purchaſors by the name of executors; per Manwood J. 3 Le. 21. in Cranmer's caſe, cites 19 E. 3. Fitzh. Covenant, 24.

3 Le. 154. Arg. cites 16 E. 3. Quid Juris clamat, 22. 20 E. 3. Ibid. 31. that ſuch intereſt may be granted by A. but denied by Wray Ch. J. and cited D. 150. Gravener's caſe, that ſuch intereſt is void.

2. Executor *is a good name of purchaſe*; per Dyer J. 3 Le. 21. pl. 49. Hill. 14 Eliz. C. B. in Cranmer's caſe.

Cranmer's caſe was thus: Archbiſhop Cranmer made a feoffment to the uſe of himſelf during his life, and after his deceaſe to the uſe of his executors and aſſigns for 20 years, and after to T. C. in tail. The archbiſhop had no intereſt in the term, and his executors (had it not been for his attainder) would have taken by purchaſe. Mo. 100. Cranmer's caſe. ——D. 309. S. C. ——And. 19. Kirk v. Bails, S. C. ——Bendl. 207. S. C.——Le. 196. S. C.——2 Le. 9. S. C.

3. *Leaſe to A. habendum to A.'s executor* and aſſigns, for 40 years after the expiration of former leaſe granted to A. for 40 years, of the ſame lands, is void; for it is a perſon who is not a party. 3 Le. 32, &c. pl. 60. Mich. 15 Eliz. C. B. Anon.

If a leaſe be made to A. for life, remainder to his executors for years, and A. dies, this will be aſſets in the executor's hands, though it never was the teſtator's, as was reſolved per three juſtices againſt Anderſon Ch. J. and there it was ſaid that Cranmer's caſe, where in effect it was reſolved, was of little authority, for that there were two juſtices againſt two till Mounſon J. changed his opinion, on a conceit that there the eſtate was by way of uſe, which could make no difference; the like law of a leaſe for years bequeathed to A. for life, and after to B. who died, living A. it ſhall be aſſets in B.'s executor's hands. Went. Off. Ex. 82.

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4. If a man have a *leaſe for life, remainder for* 40 *years*, the remainder is void, becauſe there is no perſon named to whom it is limited; but if a man makes leaſe for life and *after his death to his leſſee for* 40 *years*, it is good, and the executor ſhall have it as in right of his teſtator; but where a man makes a leaſe for years or life, the *remainder after his death for forty years to his executors*, the executors ſhall have it as purchaſors, for this word (*remainder*) divides it from the teſtator, and makes the executors purchaſors; per Anderſon. Ow. 125. Mich. 40 & 41 Eliz. in caſe of Sparke v. Sparke.

D. 310. Marg. pl. 79. S. C. cited.—— Yelv. 9. S. C.—— Cro. E. 840. S. C. adjornatur.—— Walmſley J. diſtinguiſhed this caſe from Cranmer's 14 Eliz. Dyer, becauſe in that caſe, it is limited by way of uſe, and by the party himſelf, ſo he ſhews his own intent that it ſhould not veſt in himſelf but in his executors, but here the limitation is by a ſtranger, wherein there is not any intention appears but that it ſhould veſt in the leſſee himſelf, and by this difference all the books are reconciled. Cro. E. 666. in caſe of Sparke v. Sparke.

5. If a man *covenants to ſtand ſeiſed* to the uſe *of himſelf for life, remainder to his executors*, the executors ſhall take to the uſe of the teſtator; but if a man for good conſideration covenants to ſtand ſeiſed to the uſe of *the executors of a ſtranger*, there the word (executors) is a word of purchaſe, and they ſhall take

to their own uſe; per Popham Ch. J. 4 Le. 239. pl. 387. B. R. Anon.

6. Deviſe of a *rent-charge to his wife for life*, and after ſays, *if ſhe marry, his executors ſhall pay her* 100*l. and the rent ſhall ceaſe and return to the executors.* The rent is to continue till the 100l. is paid, and the executor is in nature of a purchaſer, and muſt pay the 100l. before he ſhall have the rent, and that whether there be aſſets or not; per two juſtices againſt Twiſden, who thought the deviſor's meaning was to give her a preſent intereſt in the 100l. and that in ſuch caſe the rent muſt ceaſe preſently upon the marriage; but however, ſince it was to be *iſſuing out of the inheritance*, he thought it doubtful, and conſented to the judgment for the baron in the right of the wife. Mod. 272. pl. 25. Trin. 29 Car. 2. B. R. Oſborn v. Walleeden.

## (O. b) Where he ſhall have the Surplus.

1. A. By the contrivance of B. his nephew, made a will, and B. executor, and *ſaid nothing in his will of his perſonal eſtate, which* by this means *the executor claimed though teſtator left a ſon*; but it appearing by ſeveral matters that A. intended it for his ſon, &c. decreed for the ſon (an infant), and defendant to be examined on interrogatories, and to be reſtrained from confeſſing judgments, &c. to creditors of teſtator, and the cuſtody of the infant taken from him. Fin. Rep. 351. Paſch. 30 Car. 2. Corcellis v. Corcellis.

2. A. bequeathed ſome legacies, and adds, *I give the reſt of my goods and chattels to my executors*, and afterwards *I give to my executors the ſum of* 100*l. a-piece* for their care and trouble, and after my debts and legacies paid, *I give all the reſt of my perſonal eſtate to the children of C. the money to be paid into the hands of C.* and makes *C., D., and E. executors.* Decreed the children of C. to have the intire reſiduary eſtate, becauſe 100l. a-piece was bequeathed to the executors, and decreed the reſidue of the money to be paid [ 408 ] into C.'s hands according to the will, and the reſt of the perſonal eſtate to be delivered to the children. Vern. 30. Hill. 1681. Fane v. Fane.

Vern. R. 412. S. C. the teſtator bequeathed a particular legacy to the heir as well as to the executor.

3. *Mortgagee in fee-ſimple* deviſed 100l. and other legacies, and then deviſed 100l. to H. whom he makes executor; it was ſtrongly urged that the executor was limited to the 100l. and the rather becauſe his legacy was expreſsly willed not to be paid till after debts and other legacies paid, yet Jeffries C. decreed the mortgage to the executor, though the lands was deſcended to the heir. 2 Ch. Caſes, 187. Mich. 2 Jac. Canning v. Hicks.

4. A. makes B. and C. his executors, and deviſed to them 20l. *a-piece*, and alſo deviſed to them 800l. *in truſt for payment of annuities to L., M., and N.* for life, far exceeding the intereſt of the 800l. and deviſed the ſurplus to his nephews D. and E. to be equally *divided* between them, and appoints his executors to lay out the ſame

ſame for their benefit. L., M., and N. being dead, the unexhauſted remainder of the 800l. ſhall go to D. and E. the reſiduary legatees, and not to B. and C. the executors, who had only the 800l. as a *depoſitum*, and were not bound to pay beyond it; per Jeffries C. Vern. 425. pl. 400. Hill. 1686. Cock v. Beriſh.

5. A man made his will, and *deviſed all the reſiduum of his perſonal eſtate to J. S. and to his wife, nevertheleſs in truſt for his wife, and made the ſaid J. S. and his wife executors.* After making of this will, and ſix months before the death of the teſtator, the *wife died*, and *then the teſtator died*; and the next of kin preferred a bill againſt the executor to have an account of the perſonal eſtate, and inſiſted upon it that J. S. was only a truſtee, and had no benefit intended him by the teſtator. But per tot. Cur. the bill was diſmiſſed, for *the law had caſt it upon J. S. by being executor*, and there appeared no intent of the teſtator that it ſhould be otherwiſe. 2 Freem. Rep. 105. pl. 115. Trin. 1689. Anon.

6. A. by will deviſed *particular legacies to his children* and grandchildren, and 10l. *a-piece to J. S. and J. D. his executors for their care;* there was a ſurplus of 5000l. Jeffries C. decreed it a truſt for the children. Vern. 473. pl. 462. Mich. 1687. Foſter v. Munt.

S. C. cited by Ld. Chancellor, 2 Vern. 649. Hill. 1709. and ſaid by him to be ſettled in the Houſe of Peers. —— Equ. Abr. 243. (D) pl. 1. S. C. but the author in a note in the margin ſays, that ſince this caſe there have been variety of reſolutions both in Chancery, and the Houſe of Lords, on this head; notwithſtanding which, this matter ſeems as undetermined as any in equity; for though the law caſts the whole perſonal eſtate on the executor, yet as the intention of the teſtator is chiefly to be regarded in a will, if it appears by a ſtrong and neceſſary implication, that the executor was not to have it to his own uſe, equity will decree him a truſtee for the next of his kin to the teſtator; and therefore it ſeems agreed, that if ſtrangers or diſtant relations are made executors, and legacies are given them for their care and trouble, that they ſhall not have the ſurplus, but where the executors are as nearly related, as thoſe who claim as next of kin; and they have had all legacies given them, though perhaps ſome of them greater, and ſome of them leſs, great doubt has been, in which inſtances it has (as appears by the caſes) been determined according to the intention of the teſtator, collected not only from the words of the will but likewiſe from collateral proof of teſtator's greater kindneſs, &c. which upon theſe occaſions has been admitted, ſometimes for the executor, and ſometimes for the next a-kin. —— Parker C. ſaid he was not ſatisfied with the notion of a legacy to an executor excluding him from the ſurplus, and therefore had not the executor ſubmitted to account for the ſurplus, he ſaid he knew not if he ſhould have decreed him to account for it. Paſch. 4 Geo. 10 Mod. 400. ..... v. Mortimer Powell. —— See Wms.'s Rep. S. a note at the bottom of the page relating to an objection that this caſe was ſo decreed upon a fraud in obtaining the will, which is there denied. —— S. P. per Ld. C. Parker. Ch. Prec. 567. —— Gil. Equ. Rep. 126, 127. S. C. accordingly. —— 2 Wms.'s Rep. 162. ſays the S. P. was decreed by Ld. C. Macclesfield, 24 February, 1720. May v. Lewin. A. deviſed 50l. to B. his brother, and 50l. to his nephew C. and made B. and C. executors, and gave 20l. a-piece to other relations, ſeveral of whom were his brother's nephews and nieces, and as ſuch his next of kin in equal degree within the ſtatute of diſtribution, after which the teſtator abruptly broke off without ſaying, In witneſs whereof, &c. or making any diſpoſition of the * ſurplus. The will was wrote all with A.'s own hand, though not ſigned by him, and was proved in the ſpiritual court as his will. Ld. Ch. Parker held, that the executors were but truſtees with reſpect to the ſurplus, and decreed the ſame to go to the next of kin, according to the ſtatute of diſtributions. Wms.'s Rep. 544 to 555. Trin. 1719. Farrington v. Knightly. —— Chan. Prec. 566. pl. 346. Trin. 1721. S. C. —— 10 Mod. 442. Trin. 5 Geo. 1. in Canc. S. C. but Ld. Chancellor took further time to conſider of his decree.

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7. *I diſpoſe of my eſtate after-mentioned, and what elſe I have* in the world, in manner and form following; and gives ſeveral legacies to his relations, amounting to near the value of his whole perſonal eſtate, as appeared by a calculation of his own hand writing about that time made, and then makes B. and C. his executors, and gives them 20l. and intreats them to take the trouble Chan. Prec. 12. S. C.

of getting in his eſtate. Teſtator lives 10 years after, and acquires an additional eſtate; per Commiſſioners decreed the executors to be but truſtees, and that the *new acquired eſtate ſhould go to the legatees in proportion to their legacies.* 2 Vern. 148. pl. 144. Trin. 1690. Cordell v. Noden.

8. Teſtator by will gave *20l. for mourning to a ſtranger*, and made him *executor*. Diſtribution was decreed 7 Annæ, 2 Vern. 676. in caſe of Ball v. Smith, cites it as the caſe of Cook v. Walker, 19 May 1691.

9. *Wife and two ſtrangers* were made executors, and *100l. legacy to the wife*, and the intereſt of 300l. to her for her life; to William he gave *20l. for mourning*. Surplus decreed to be diſtributed. 2 Vern. 677. in caſe of Ball v. Smith, cites it as the caſe of Darwell v. Bennet, in 1692.

But ſuch diſtribution is not ſuable for in the ſpiritual court, and a prohibition was granted niſi. 5 Mod. 247. Trin. 8 W. 3. B. R. Petit v. Smith.——

10. *A. had a daughter* and two brothers, and made his will, and thereby *gave 5l. a-piece to his brothers, appointing them executors*, but *made no diſpoſition of the ſurplus*. On a bill by the daughter for an account, there were proofs that A. intended his executors the ſurplus, the daughter being under A.'s diſpleaſure by marrying againſt his conſent, but being ſomewhat doubtful it was decreed at the Rolls, and affirmed by the Ld. Somers, that the executors ſhould be but truſtees after their legacies paid, and the ſurplus to go according to the ſtatute of diſtribution. Wms.'s Rep. 9. 20 May 1696. Petit v. Smith.

Comb. 378. S. C. accordingly.——Ld. Raym. Rep. 86. S. C. accordingly.——Ibid. 363. Mich. 10 W. 3. S. P. by Holt Ch. J.——Wms.'s Rep. 7. S. C. and though the ſpiritual court has no ſuch power, yet the court of Chancery looks upon the executor as a truſtee with regard to the ſurplus, and will make him account.——Comyns's Rep. 3. S. C. the Court inclined that a prohibition ſhould go.

But where B. and C. were next heirs, and A. deviſed to B. by name, and after made him executor, but gave him no legacy, it was decreed that there was no reſulting truſt. Mich. 1691. decreed and affirmed in parliament. Abr. Equ. Caſes, 273. Cunningham v. Meliſh ——* And A. gave to his executors 100l. a-piece as a legacy, and therefore Sir John Trevor, Maſter of the Rolls, decreed that this legacy to the executors created a reſulting truſt of the reſidue of the perſonal eſtate for the next of kin. Ch. Prec. 81. S. C. by the name of Ld. Briſtol v. Hungerford.—— S. C. cited by Ld. C. Parker. Wms.'s Rep. 550. in caſe of Farrington v. Knightley.

9. A. deviſed his *lands to his executors to be ſold for payment of debts*, and that *if any ſurplus* be after debts paid, it ſhould be deemed part of his perſonal eſtate, and *go to his executors*; * yet executors were decreed to account, and pay the ſurplus over to the next of kin. 2 Vern. 361. pl. 325. Mich. 1698. cites it as the caſe of Sir William Baſſet.

S. C. cited by Lord C. Parker, Trin. 1719. Wms.'s Rep. 550. in caſe of Farrington v. Knightly.——

12. A. gave ſeveral *legacies to all her next of kin by name*, and particular legacies to B. and C. two diſſenting miniſters, and made them executors, but made no expreſs *diſpoſition of the ſurplus*, of her perſonal eſtate who ſhall take the ſurplus. The executors were obliged to diſtribute the ſurplus amongſt the next of kin. 2 Vern. 361. pl. 325. Mich. 1698. Bailey v. Powell.

Ch. Prec. 92. S. C. Paſch. 1699. ſays ſhe bequeathed the legacies to truſtees to † be put out for the benefit of the next of kin, and did not truſt them with their own legacies, and it appeared that ſhe had no great kindneſs for them. Ld. Somers decreed a diſtribution, and the executors to pay coſts for inſiſting on it.

13. A. makes *his wife executrix*, but *bequeathed nothing more to her than was her own before* as *executrix* of her former husband, and what was otherwise hers before her marriage with A. Per Harcourt K. decreed on view of precedents the surplus to the wife, there being only the single case of WARD v. LANE, where the wife executrix has been excluded the surplus, the case of DARWELL v. BENNET, where two strangers were executors with the wife, not coming up to the case. 2 Vern. 675. pl. 602. Hill. 1711. * Ball v. Smith.

* S.C. cited and admitted by counsel, 2 Wms.'s Rep. 332. in case of Attorney General v. Hooker.—S. C. cited by Ld. C. Parker.

But he said he did not hear of any precedents cited that go further. Wms.'s Rep. 539. Trin. 1719. in case of Farrington v. Knightley. ——But Ibid. pag. 551. his Lordship said, that as to what had been said heretofore that there was but a single precedent of this kind, he had now seen several of those decrees, and that they made no difference where a wife, and where a more remote relation had the executorship; for that still in all those cases, if there was no express disposition of the surplus, the executor, whoever he was, had been looked upon as a trustee, with respect to such surplus for the next of kin; and that having spoken with Mr. Vernon in his life-time, he told him that there had been so many decrees upon the point, and it had been so fully established, that he thought it not worth while to take notice of any later decrees, apprehending it a principle as much fixed as that fee-simple land should descend to the heir. —— Ld. C. Parker, Wms.'s Rep. 552. Trin. 1719. cites this case of Ball v. Smith, thus (viz.) A. devised some plate to his wife which she held as executrix to her former husband, and two other pieces of plate in lieu of, and recompence for some other plate, which likewise had belonged to his said wife as executrix of her former husband, but which A. had disposed of and made no devise of the surplus. Decreed that this should not bar her of the surplus, because the devise of the plate which she before was intitled to as executrix of her former husband was void, the second husband having no power to dispose of that by his will, though he might do it by act executed in his life-time; and as to the other plate in lieu and recompence of the other plate disposed of in his life-time out of what belonged to her as executrix, it must be reasonable to construe this as a restitution rather than a gift.

14. After several devises of lands to several persons, and 50*l.* *given to the heir at law to buy mourning*, and other legacies to others, the testator gives 5*l.* *a-piece to B., C., and D. to buy mourning*, and *all the rest, &c. of my manors, &c. goods, chattles, &c. and all other my real and personal estate whatsoever, I give to B., C., and D.* whom I nominate and appoint *executors of this my will, equally to be divided between them, to hold to them, and their assigns for ever.* Decreed that the surplus being expressly given here can be no resulting trust for the heir, and the heir having a legacy given him, and not the surplus, turns the argument strong against him. Affirmed in the House of Lords. Ch. Prec. 94. pl. 83. Pasch. 1699. Dormer v. Berty.

15. The testator *made one executor who was no relation to him but a mere stranger, and gave him* 50*l.* *for his care in the execution of his will;* the plaintiff being next of kin exhibited a bill for the residuum of the estate, and no counsel appearing on the other side, he had a decree nisi causa; for per Turton J. with whom the bar agreed, the executor in such case shall not have the residuum after debts and legacies paid, but the next of kin to the testator; and so it was said it had been decreed in the like case between CORDALL AND CORDALL; it is true, *if the executor had been nearly related* to the testator it might have been otherwise, but even in such case, *if there are other relations in equal degree with him, and are poor and indigent*, equity in such doubtful cases

will give the reſidue amongſt them. 3 Salk. 82. pl. 1. Mathews v. Courthope.

S.C. cited by Ld. C. Parker, Wms.'s Rep. 550. in caſe of Farrington v. Knightley. [411]

16. A. having a *wife, but no child, and two brothers*, by will gave to his nephew and nieces one moiety, and the other *moiety of a banker's debt to his wife, and made her ſole executrix*; per Cur. the wife by a deviſe of the moiety of the debt was *excluded* from the ſurplus of the perſonal eſtate as executrix, though there was no child, and though *legacies to the brothers* (one of which was *heir at law*) *were given out of the land*, which had not been neceſſary unleſs A. intended the ſurplus of the perſonal eſtate for his wife, that otherwiſe had been ſufficient to pay thoſe legacies. 2 Vern. 425. Paſch. 1701. Randall v. Bookey.

Ch. Prec. 183. S. C. decreed, though it was urged that the will was made in 1673, and the courſe of diſtributing the ſurplus not introduced till long after. ——— S. C. cited by Ld. C. Parker, Wms.'s Rep. 550. as decreed by Ld. Keeper Wright. Hill. 13 W. 3.

17. The *wife* was made *executrix*, and the *huſband living* 20 *years after* the will *acquired an eſtate*. Surplus decreed to be diſtributed. 2 Vern. 677. in caſe of Bail v. Smith, cites it as the caſe of Ward v. Lane, decreed 10 Jan. 13 W. 3.

18. A. by will gave his *library of books to J. S. except ten, ſuch as M. his wife ſhould chuſe, and made M. executrix.* Ld. Wright thought this was no deviſe of the books to her, but only an exception of ten out of the deviſe to J. S. and the executrix was the proper perſon to chuſe which ſhould be excepted, and it could not be intended to bar his wife by ſo *inconſiderable a legacy*. Ch. Prec. 231. pl. 192. Trin. 1702. Griffith v. Rogers.

19. A. *deviſed to B. and C. his wife's children* (as he called them, not owning them to be his) 10*s. a-piece and no more, and gave the children which he owned conſiderable legacies, and deviſed legacies to his executors, but did not mention them to be for their care and pains*, or any thing to the purpoſe. Decreed that the executors ſhould not have the ſurplus, but that it ſhould be diſtributed among all the children. Chan. Prec. 169. pl. 140. Trin. 1701. Vachell v. Jeffries.

20. A. made his wife *executrix during her widowhood*, and if ſhe die or marry then *his ſon to be executor*, and deviſed *ſome curioſities as heir-looms* to his ſon, and the *uſe of the houſehold goods to the wife during her widowhood*. Ld. Wright thought the wife ſhould have the ſurplus, ſhe having but a *limited executorſhip*, and the heir to have it afterwards when his executorſhip ſhould take place. Chan. Prec. 263. pl. 213. Mich. 1706. Hoſkins v. Hoſkins.

21. If a man be declared executor, this of itſelf gives him an intereſt in the perſonal eſtate, and he ſhall have the whole; but *if part* of that eſtate *be deviſed to him*, it will exclude him as to the reſt, and he ſhall have no more than that ſo deviſed; per Lord Chancellor Cowper, in Canc. Paſch. 6 Ann.

Decreed a diſtribution, and the ducheſs to

22. A. made B. his wife *executrix, and deviſed to her the uſe of his table plate for life*, and after to C. his grandſon. Per Cowper C. this is a ſtrong implication that B. ſhould not have the whole, and the

the rather the ſtronger becauſe more minute and reſtrictive; if the will had been, *I give plate to C. except the uſe of it to D.* then it would have been within the reaſon of the caſe where books were given to J. S. except ſix to wife, which caſe was rightly adjudged, but this caſe differs. 2 Vern. 648. pl. 578. Hill. 1709. Lady Granvill v. Ducheſs of Beauford.

have her paraphernalia over and above a third. Ibid. 650. Wms.'s Rep. 116. S. P.—— Reverſed in Dom. Proc. and the ſurplus decreed to the ducheſs as executrix. 2 Vern. 677. Wms.'s Rep. 114. Hill. 1709. S. C. decreed, and that decree was reverſed accordingly. ——9 Mod. 10. S. C. cited. ——S. C. & P. cited by Ld. C. Parker, but that it was reverſed in the Houſe of Lords; the reaſon whereof he ſaid might be becauſe this was not properly a deviſe to the ducheſs of the uſe of the plate, but rather an exception or reſervation to the ducheſs, (viz.) a deviſe of the plate to the grandſon, reſerving the uſe thereof to the ducheſs for her life. Wms.'s Rep. 552. Trin. 1719. in caſe of Farrington v. Knightley.

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23. One *deviſed his real eſtate to be ſold for the payment of his debts, and the ſurplus, if any, to be deemed perſonal eſtate, and to go to his * executors, to whom he gave 20l. a-piece.* Decreed the ſurplus a truſt for the heirs at law, and affirmed in parliament. 2 Vern. 645. Hill. 1709. pl. 573. Briſtol (Counteſs of) v. Hungerford.

S. C. cited 3 Wms.'s Rep. 194. Trin. 1734. but the Court thought this a ſtrange determination, and to go much too far. —— Ibid. in a note of the reporter ſays, this may well be thought a ſtrange determination, and the rather, for that Mr. Vernon ſays it was affirmed in Parliament. The caſe is differently reported in Chan. Prec. 81. where it is ſaid the ſurplus was decreed a truſt in the executors, ſubject to diſtribution; and this is warranted by the regiſter's book. The decree appears to bear date 3d of July 1697, and to have been made by Sir John Trevor, (then) Maſter of the Rolls. The words whereof are as follow; "And as to the ſurplus of the ſaid "eſtate, after the debts and legacies paid, his honour having been attended with the will, and having "conſidered thereof, declared that the ſaid teſtator having by his ſaid will given to each of his execu-"tors 100l. a-piece, there is a reſulting truſt in them for the repreſentatives of the ſaid teſtator; "and that the defendants Mrs. Reppington and Mrs. Meredith, who were co-heirs and repreſentatives "of the ſaid teſtator Sir William Baſſet, were intitled thereto; and doth therefore order and decree, "That the reſidue and ſurplus of Sir William Baſſet's eſtate, his debts and legacies being paid as "aforeſaid, be equally diſtributed between them." It further appears by a ſubſequent order of the 18th of November 1708, in the above-mentioned cauſe, that this part of the decree was affirmed in parliament, for it recites, that the decree of the 3d of July had been ſigned and inrolled, and that the judgment creditors appealed to the lords in parliament, who on the 26th of February 1703, adjudged that the decree, ſo far as had been executed, ſhould not be ſet aſide or opened; but that as to the money remaining undivided, purſuant to the decree, the appellants were to be let into a ſatisfaction of their debts according to the priority of their ſeveral ſecurities. After which the order proceeds to give ſome directions in regard to the creditors. It is obvious to perceive the ſame perſons being heirs and likewiſe next of kin, (though they took only in the latter capacity,) occaſioned this miſtake in Mr. Vernon's report of the caſe.

24. A. made his wife executrix, and deviſed to her *a term for years for her life*, and a contingent intereſt as to the reſidue of the term, which contingency never happened; yet ſhe ſhall have the ſurplus of the reſt of the perſonal eſtate; per Lord Harcourt. Ch. Prec. 316. Mich. 1711. Jones v. Weſtcomb.

Gilb. Equ. Rep. 74. S. C. in totidem verbis. —— Equ. Abr. 245. pl. 10. S. C. decreed accordingly. —— S. C. cited by Ld. C. Parker. Wms.'s Rep. 552. and held that this might be ſo within the reaſon of the Ducheſs of Beauford's caſe, for it being an exception or reſervation of the term to the executrix for her life, it was not properly a deviſe to her, and conſequently no bar.

25. A. made *B. and C. his executors, and gave legacies to B. but not to C.* Per Ld. Harcourt, this ſhall not intitle C. to the whole ſurplus excluſive of B. but though (this ſuit being between B. and C.) he decreed, yet he made a doubt if theſe legacies to one executor would not exclude both, and let in the next of kin. Ch. Prec. 323. pl. 246. Hill. 1711. Coleſworth v. Brangwin.

S. C. cited, Wms.'s Rep. 547. Trin. 1719. ——Gilb. Equ. Rep. 79. S. C.

26. A. bequeathed 100*l.* *a-piece to his next of kin*, and alſo to J. S. his *executor* 100*l.* but makes no diſpoſition of the ſurplus; the queſtion was, if J. S. or the next of kin, ſhould have the ſurplus? The caſes cited were the Ducheſs of Beauford's, Smith v. Ball, Wicket v. Jones, Littlebury v. Buckley, which was firſt heard in the Mayor's court, and the ſurplus there decreed to the next of kin; and on appeal to the Houſe of Peers, the *executors were admitted to read witneſſes* to prove that the teſtator intended them the ſurplus, and on that foot the Lords reverſed the decree, 2 Vern. 673. pl. 601. Mich. 1711. Wingfield v. Alkinſon.

2 Vern. 736. pl. 645. S. C. he that drew the will ſwore that the teſtator gave no particular directions as to the ſurplus, but ſaid the plaintiffs (who were the next of kin) ſhould have no more, and he would give no more away. Ld. Chancellor held that the evidence of the drawer falls in with the tenor of the will, and takes away the preſumption that he did not intend the ſurplus for his executors, and that the preſumption that the teſtator did not intend them all, and ſome may be ouſted by proof of his intention that the executor ſhould have the ſurplus, or that the next of kin ſhould not have it; and the writer proves, that the teſtator declared that his ſiſter (the plaintiff) ſhould have no more, and ſhould not have the ſurplus.——Gilb. Equ. Rep. 125. S. C. decreed accordingly.——Equ. Abr. 246, 247. pl. 12. S. C. decreed accordingly.

27. Teſtator deviſed ſeveral legacies to ſeveral perſons, and gives a legacy to *one of the executors by his chriſtian and ſirname*, and his clothes to be diſpoſed of by his executors, and then adds, as to the 700l. I am intitled to in the South Sea Company, and the reſt of my perſonal eſtate, I will that the ſame ſhall be ſold for payment of my debts and legacies, and I make John and Thomas Serle my executors, and dies; the teſtator had deviſed 70l. for mourning to the children of Mr. Serle, of whom the executors were two, and intitled to their * proportion. Lord Chancellor decreed the reſiduum to the executors. Abr. Eq. Caſes, 246. Hill. 1716. Batchelor v. Serle.

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Equ. Abr. 244. pl. 7. cites S. C. as Hill. 1697.

28. Sir W. B. *deviſed his perſonal eſtate to pay his debts and legacies, and gave* 1000*l.* *a-piece to his executors*, and it was agreed that the ſurplus ſhould go to the repreſentatives of the next of kin. Chan. Prec. 567. in pl. 346. Trin. 1721. cited by Lord Chancellor as the caſe of Briſtol v. Hungerford.

29. A. made B. and C. executors, and gave them ſpecific legacies, and *deſiring his executors to be kind to J. S. an old ſervant, and to give him ſome* ſmall pieces of *furniture* then in the houſe if he deſired it; decreed that the executors ſhall have the reſidue of the perſonal eſtate free from diſtribution, it appearing to be the intent of the teſtator by the words aforeſaid. 9 Mod. 11. Trin. 1722. at the Rolls. Heron v. Newton.

30. An executor hath certainly the whole and entire right to the teſtator's perſonal eſtate both in law and equity, unleſs upon the face of the will it appears by ſome indication that the teſtator intended to the contrary, as by *giving him a ſpecific legacy*; for by ſuch a deviſe it appears, that he intended him no more; and this was laid down as a rule, when the Lord Jeffries was Chancellor, and with good reaſon, and hath been a ſtanding rule in the Court ever ſince (with ſome little variations and exceptions from the circumſtances of caſes) to exclude the executors. 9 Mod. 28. Trin. 9 Geo. in Canc. Hutchinſon v. Vincent.

31. Teſtator gave legacies to ſeveral perſons, and deviſed *to his next of kin* (his ſiſter) 100*l. a year for life out of his Bank ſtock, and the reſidue of his Bank ſtock to his executor* (a ſtranger and no relation), *and gave to his executor the furniture of his houſe, and a certain ſum of money to his ſiſter the next of kin.* Lord Chancellor King held that if the expreſs legacy to the executor be allowed to exclude him of the ſurplus, by the ſame reaſon the expreſs legacy to the ſiſter will bar her likewiſe; and then here being *excluſion againſt excluſion*, the law muſt take place, and the executor have the ſurplus as executor. 2 Wms.'s Rep. 338. Hill. 1725. Attorney Gen. v. Hooker, and Somner v. Hooker.

In this caſe Ld. C. King ſaid, that he could wiſh an act of parliament was made to reduce this point to a certainty; for if it were once ſettled either way, it would be well enough. Ibid. 340. ——— The reporter there ſays, that Mr. Lutwich ſaid that this would ſhake many precedents.

32. In the caſe of a will though an *expreſs legacy be given to the executor*, yet if a *legacy is alſo given to the next of kin*, this is equally a bar to the next of kin, as to the executor; and therefore if the *ſurplus* be *not diſpoſed of* by the will, the *executors ſhall have it.* Qu. 2 Wms.'s Rep. 338. pl. 97. Hill. 1725. Somner v. Hooker.

When an executor has an expreſs legacy for his care and pains, though the next of kin has alſo an expreſs legacy; the ſurplus ſhall go according to the ſtatute of diſtribution, eſpecially if the ſurplus was intended to be diſpoſed of. 3 Wms.'s Rep. 43. Trin. 1730. Davers & al. v. Dewes & al'.

## (P. b) Executor Truſtee. His Power and Intereſt. [414]

1. AN executor though a bare truſtee, and though there be a reſiduary legatee, is *intitled to ſue for the perſonal eſtate in equity as well as law, unleſs the ceſtuy que truſt will oppoſe it.* 3 Wms.'s Rep. 34. Hill. Vac. 1729. Jones v. Goodchild.

2. Truſtee *cannot change the nature of the eſtate* by turning money into land, or a leaſe for years into a freehold, & e converſo. 3 Wms.'s Rep. 100. Hill. Vac. 1730. Witter v. Witter.

## (Q. b) Infant Executor. What he may do; and in what Caſes he is bound.

1. TROVER and converſion of goods by the executors of R. againſt huſband and wife, of the goods of the teſtator, which came to the hands of the wife dum ſola fuit. The defendant pleaded a releaſe of the plaintiff after the death of the teſtator, and after the trover and converſion the plaintiff ſaid he was then within age; it was adjudged, that becauſe there was *no conſideration alleged for the releaſe*, it ſhould not bind the infant executor, becauſe he would thereby charge himſelf in a devaſtavit. Mo. 146. pl. 289. Hill. 21 Eliz. B. R. Ruſſel's caſe.

Ibid. ſays that Plowden was ſtrong in opinion againſt the judgment; but Wray Ch. J. ſaid to him, that he had conferred with all the juſtices of England, and they had agreed to give judgment for the infant; becauſe the releaſe being without conſideration, the infant would charge himſelf in a devaſtavit. ——5 Rep. 27. a. S. C. reſolved accordingly. ——And. 177. pl. 212. S. C. reſolved accordingly in the Exchequer Chamber. ——— Ibid. is a note that Paſch. 30 Eliz. this judgment was reverſed in error in Cam. Scacc. for other matter in the pleading, but not upon the matter in law.

2. Note,

4 Le. 210. pl. 311. S. C. in totidem verbis, only it is ſaid (adjudged) inſtead of (agreed). Gibb. 1. Arg. cites S. C.

2. Note, it was agreed by the juſtices in this caſe, that where an infant executor *ſold the goods* of his teſtator *at leſs than they were worth*; and afterwards brought an action of detinue againſt the vendee upon it in retardatione executionis teſtamenti; that this ſale of the infant executor was good; and ſhould bind him notwithſtanding his nonage. 3 Le. 143. pl. 192. Mich. 28 Eliz. B. R. Manning's caſe.

3. A. made his wife executrix and died, the wife proved the will and adminiſtered, and made J. S. her ſon, of the age of 13 years, her executor, and the defendant *overſeer* and died; the infant proved the will; the defendant *with the conſent of the infant ſold goods* to the value of 140l. to the uſe of the infant; it was the opinion of the juſtices that this was no adminiſtration, but a good ſale by the executor; for an infant executor is to pay debts, [ 415 ] and then he muſt ſell goods to pay them, and therefore the ſale of another by his conſent, where it is not to his prejudice, is no adminiſtration but good. Cro. E. 254. pl. 25. Mich. 33 & 34 Eliz. B. R. Clerk v. Hopkins.

4. What an infant does according to the office and duty of an executor ſhall bind; as to *diſcharge the debtor* for ſo much as he receives; but to do any thing that may amount to a *devaſtavit*, as a releaſe without payment, &c. he cannot. 5 Rep. 27. b. Hill. 26 Eliz. B. R. Ruſſel's caſe.

And. 177. pl. 212. S. C. by name of Ruſſel v. Pratt held accordingly. —— S. C. cited Roll. Rep. 366. —— S. C. cited per Cur. and agreed for good law. Poph. 130. Mich. 15 Jac. B. R.

5. *But* an *infant executor* may make a releaſe upon a true ſatisfaction, but not otherwiſe. 5 Rep. 27. b. Hill. 26 Eliz. B. R. Ruſſel's caſe.

Gibb. 2. contra. —— If infant releaſes where he has no conſideration he ſhall anſwer for his own goods, when he comes of age, for the waſting of the eſtate, and ſuch releaſe ſhall be aſſets. Godb. 30. pl. 39. 27 Eliz. C. B. Kittley's caſe.

6. Though an infant at 17 may *adminiſter*, yet he cannot commit a *devaſtavit* till 21. Per Ld. Keeper. Vern. 328. pl. 323. Paſch. 1685. Whitmore v. Weld.

7. Debt upon an obligation made to the teſtator, the defendant pleaded a *releaſe* made by one of the plaintiffs; the plaintiff replies, that this releaſe was made without any conſideration, and he who releaſed was within age at the time of the releaſe made. It was thereupon demurred; and adjudged for the plaintiff that it was a void releaſe, being *by an infant without conſideration*. Cro. E. 671. pl. 27. Paſch. 41 Eliz. Knot v. Barlow.

8. It was reſolved by all the judges, that a *releaſe* of a debt, or a duty by an infant executor after the probate of the will, *without receiving the entire debt, is void*, becauſe it ſhould be a devaſtavit, and charge the infant of his proper goods, and alſo it ſhould be a wrong which the infant cannot do by his releaſe, becauſe it is an act not purſuant to the office of an executor who is to do his

his office truly, diligently, and faithfully. *But upon payment of all the money to an infant executor, he may make a releaſe*, and it is good. Cro. C. 490. pl. 15. Mich. 13 Car. B. R. Kniveton v. Latham.

9. If an infant executor *aſſents to a legacy*, it is not good unleſs there are other aſſets for debts, and ſo may work a wrong to the creditors; per Ld. Keeper Finch. Chan. Caſes, 257. Hill. 26 & 27 Car. 2. in caſe of Chamberlain v. Chamberlain.

13. Though an infant *at* 17 may adminiſter, yet he *cannot commit a devaſtavit* until 21. Per Ld. Keeper. Vern. 328. Paſch. 1685. Anon.

## (R. b) Refuſal. What is. And How. And the Effect thereof.

1. TRESPASS *by adminiſtrators of goods carried away*, the *defendant ſaid that the teſtator was poſſeſſed as of his proper goods, and made J. S. his executor and died, and after the goods came into the hands of the plaintiff, and the defendant by command of the executor took the goods, and after the executor refuſed before the ordinary who committed the adminiſtration to the plaintiff*, judgment; and [416] per Laicon, Priſot, and Moyle, it is a good plea, and the *colour* is good, for the defendant confeſſes poſſeſſion in the plaintiff, and the power of the adminiſtrator by the committing of the adminiſtration ſhall have relation to the death of the inteſtate, and therefore this is matter in law at the leaſt, whether the juſtification be now good or not, and *when matter in law is, there needs no colour*; for it is matter in law when the adminiſtration is ſo committed, whether the adminiſtrator ſhall have treſpaſs of the taking before the committing of the adminiſtration or not, and by them the plea is good; for when the defendant had good cauſe to juſtify at the time, &c. it ſhall not be loſt by the refuſal of the executor after, who is a third perſon. Br. Treſpaſs, pl. 222. cites 36 H. 6. 7.

2. *The ordinary himſelf who is made executor may refuſe before his own commiſſary.* Br. Ordinary, pl. 13. cites 9 E. 4. 33.

3. *Where* a man makes a teſtament and *executors*, and they *refuſe*, yet the *legacies ſhall be paid*; for no default is in the teſtator, and the teſtament ſhall be annexed to the letters of adminiſtration; quod nota diverſity. Br. Teſtament, pl. 20. cites 37 H. 8.

4. A. and B. *executors; A. proved the will, and B. refuſed before the ordinary, who* thereupon *granted the adminiſtration to A. who made his executor and died*; and that executor alone, without joining B. brought debt againſt a debtor of the firſt teſtator, and it ſeemed to Brooke Ch. J. that the action was well brought; for though B. might adminiſter at any time during the life of his companion, notwithſtanding ſuch refuſal, yet after his death his election is gone; for now in law the firſt teſtator is dead inteſtate. But that in 21 E. 4. 23. the opinion of the Court was, that

Jenk. 106, 107. pl. 4. S. P. and cites S. C. —Went. Off. Ex. 41. cites the opinion of Brook Ch. J. but ſays, quod non eſt lex. —— D. 160. b.

Marg. cites 9 Rep. 37. Henſloe's caſe, that the ſurvivor may have action.

that the action was not maintainable by the executors of the executors, &c. Ideo quære bene. D. 160. b. pl. 42. Paſch. 4 & 5 P. & M. Anon.

——If H. makes his will and ſeveral executors, and one of them refuſes, but the reſt adminiſter, that makes his refuſal void, and the refuſing executor may notwithſtanding releaſe any debt; cites 5 Rep. 28. a. [Middleton's caſe.] And in actions brought by them, the refuſing executor muſt be named, cites 9 Rep. 97. And if the refuſing executor ſurvives, he may take the executorſhip upon him. The caſe indeed in Dy. 160. is contrary, and holds that the refuſing executor muſt come in and act during the life of the acting executor; but the 21 E. 4. 23. is contrary to Dyer, and according to the preceding poſition. And in Hardr. 111. PAWLET v. FREKE, it is reſolved that where the refuſing executor ſurvives, adminiſtration committed during his life is void; per Holt Ch. J. 1 Salk. 307. Hill. 1 Ann. B. R. in delivering his opinion in the caſe of Wankford v. Wankford.

But when the ſurviving executor is dead inteſtate, adminiſtration both of the ſurviving executor, who died inteſtate, and of the goods of the former teſtator not being adminiſtered, may be granted. God. Orph. Leg. 88.

5 If *debtee* named *executor ſue the ordinary for the debt*, this amounts to a refuſal of the executorſhip. Went. Off. Ex. Marg. 37. cites Mich. 28 & 29 Eliz. C. B. Brooker v. Carter, and 9 E. 4. 35. and Pl. C. 194. 2.

6. If executor *neglects probate for a year*, this is a refuſal irrevocable in the civil law, and adjudged accordingly. Mo. 273. pl. 426. Hill. 31 Eliz. Bewacorne v. Carter.

Went. Off. Ex. 37. cites S. C.

7. Executor refuſing, *loſes his legacy*. Ow. 44. 31 Eliz. Catlin's caſe.

Mo. 594. pl. 806. S. C. held accordingly.

8. If executor refuſes to be executor, it ſhall not hinder him to take by a deviſe as to an *inheritance* deviſed to him. Poph. 8. Mich. 34 & 35 Eliz. C. B. Gibbons v. Maltyard and Martin.

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9. If a man *libels* in the eccleſiaſtical court *againſt an adminiſtrator after refuſal of the executorſhip for a legacy*, and he *can prove the will* by which the legacy was given *but by one witneſs*, and therefore they *will not allow it*, yet no prohibition lies; for by our law there is not any teſtament where there is not any executor, and therefore if they will give him relief they may give it in what manner they pleaſe. 2 Roll. Prohibition (Q.) cites Hill. 37 Eliz. B. R. per Cur.

10. *Debt* upon obligation of 100l. *againſt two executors A. and B.—A. was outlawed. B. pleaded that A.* was made executor, and *ſolely proved the will and adminiſtered, and he as ſervant to A. took divers of the teſtator's goods by his delivery, and by his appointment ſold them, abſque hoc that he adminiſtered in other manner.* It was adjudged to be no plea, becauſe he doth not ſay he refuſed before the ordinary, nor confeſſes any adminiſtration, and ſo no anſwer to the plaintiff; and judgment for the plaintiff. Cro. E. 858. pl. 27. Mich. 43 & 44 Eliz. C. B. Godfrey v. Woodward.

Bacon Ld. K. Catlin Ch. J. and the Maſter of the Rolls being named

11. Refuſal cannot be verbally, but muſt be by ſome *act entered in the ſpiritual court*, and therefore muſt be before ſome ſpiritual judge, and not before neighbours in the country. Went. Off. Ex. 37.

executors, they wrote a letter to the ordinary that they could not attend the executorſhip, and wiſhed him to grant adminiſtration, who did ſo and recorded their refuſal, and held good. Went. Off. Ex. 37. cites it as Sir Ralph Rowlet's caſe. —— Ow. 44. 31 Eliz. Sir Robert Rowley's caſe.——By the civil law a renouncing may be as well by matter in fact as by a judicial act, and they may refuſe

refuſe by parol; declared ſo by Dr. Ford to the juſtices. Cro. E. 92. pl. 21. Hill. 30 Eliz. C. B. in caſe of Broker v. Chater.

12. If executor *adminiſters and after refuſes*, and the *ordinary not knowing of the adminiſtration accepts the refuſal and grants* adminiſtration, it was thought that the ordinary might *revoke the adminiſtration* upon its appearing to him that executor had adminiſtered, and might inforce the executor to proceed to prove the will. Went. Off. Ex. 39.

13. If upon *proceſs* againſt the executor to come in and prove the will, and he does not come in, he may be excommunicated; but if he comes in and will not prove the will, the ordinary upon ſuch refuſal may commit adminiſtration. Went. Off. Ex. 37.

14. An *executor commanded one to take the goods*, and after the executor refuſed before the ordinary who granted adminiſtration, and the adminiſtrator ſued the perſon that took the goods, who *juſtified* by the executor's command, and it was held good. Vent. 304. Hill. 28 & 29 Car. 2. B. R. cites 36 H. 8. 6. Went. Off. Ex. 38. cites it as 36 H. 6. fol. 7, 8. and ſays, that perhaps quod fieri non debuit factum valet, and that it might be that the ordinary did not know of the executor's intermeddling at the time when he admitted his refuſal.

15. It was held per Curiam, that if a *term for years* of lands be *deviſed to executors in truſt for payment of debts*, if *all the executors renounce*, &c. *and will not convey over to others*, to the end that they may execute the truſt, that the truſt and term for years are both loſt; ex relatione Magiſtri Shelley. Ld. Raym. Rep. 740. Mich. 8 W. 3. B. R. Anon.

16. Teſtator as an encouragement to his executors (who were four) to accept of the truſt and executorſhip, gave to each 100*l.* *and* 12*l. a-piece for mourning*, and to each of them a *ring*, and 10*l. for their trouble.* Ld Chancellor ſaid, that the refuſing executors ſhould have their rings and mourning, which were intended them immediately, but not the 100l. or 10l. annuity, and that renouncing executor's ſhare ſhould not go over to the other executors, but ſink for the benefit of the eſtate. Wms.'s Rep. 333. Hill. 1716. Humberſton v. Humberſton. 2 Vern. 737. pl. 646. S. C. but S. P. does not appear. —Chan. Prec. 455. pl. 291. S. C. but S. P. does not appear. —Gilb. Equ. Rep. 128. S. C. in totidem verbis with Chan. Prec.

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17. One *deviſes that his executors ſhould ſell his land*, and leaves two executors, *one* whereof *dies*, and *the other renounces*, and adminiſtration is granted to A. who brings a bill againſt the heir to compel a ſale; it was objected that the renouncing executor, in whom the power of ſale collateral to the executorſhip is veſted, ought not to be made a party. But the objection was over-ruled. The reporter adds a quære. 2 Wms.'s Rep. 308. Mich. 1725. Yates v. Compton. Sel. Caſes in Canc. in Ld. King's Time, 54. S. C. it was held, that the eſtate deſcends to the heir at law, and he is only a truſtee to the uſe of the will ſince the executors renounce, ſo no occaſion to be parties.

## (S. b) Refusal. At what Time it may be.

1. DEBT against *executor*, who *said that the administration was committed to him by the ordinary, and shewed in certain, &c. by which he administered, but not as executor; judgment of the writ*; the *plaintiff said that before sequestration of the bishop, and before the administration committed, the defendant proved the testament before W. T. and administered as executor* of the goods of the deceased, *absque hoc that the deceased died intestate*, and *did not shew what goods he administered, nor in what place*, and so it seems that he who administers as executor cannot relinquish it and take the administration; contra it seems to be of him who administers de son tort demesne, as in 21 H. 6. 8. Br. Executor, pl. 107. cites 1 E. 4. 2.

Went. Off. Ex. 38. S. P.

2. If the *executors administer* they cannot refuse after; quod nota. Br. Executors, pl. 90. cites 9 E. 4. 33.

3. *And* it is said there, that Mich. 19 H. 6. *debt against an executor, who said* that *the administration was committed to them before the writ purchased*, and *so are administrators; judgment of the writ*; and the *plaintiff said, that after the death of the testator, and before the administration committed, the defendant administered*, &c. and upon this they were at issue, and therefore it seems that he cannot refuse after. Ibid.

4. *Two executors* were jointly made in a will; *one* of them *releases a debt* due to the testator, and *after, before the ordinary refuses to administer*; and it was agreed by all the justices that the release was administration, and for that he has made his election, and then the refusal comes too late, and so is void. 2 Brownl. 58. Hill. 8 Jac. C. B. Wickenden v. Thomas.

5. A *mandamus* was prayed to the ecclesiastical court to grant the probate of the will under seal, &c. The case was, the executor named in the will had taken the usual oath, and then refused, (but after a *caveat* entered,) and another endeavoured to obtain letters of administration. The executor came afterwards to desire the will under probate, and contested the granting of administration, which was adjudged against him, supposing that he was bound by his refusal; and after an appeal to the delegates this *mandamus* was prayed and granted by the Court, for having taken the oath he could not be admitted to refuse, and the ecclesiastical court had no further authority, and the *caveat* did not alter the case. Vent. 336. Pasch. 31 Car. 2. Anon.

## [419] (T. b) Refusal by one Executor where there are more. The Effect thereof.

1. IF *he who proves the testament dies*, there the *other who* refuses and *survives may have action*. Br. Executors, pl. 117. cites 21 E. 4. 24. per tot. Cur.

2. If

2. If A., B., and C. are executors, and A. only refuſes, and B. and C. prove the will, yet A. *is ſtill executor and may releaſe debts*, and releaſes may be made to him, and may *adminiſter afterwards when he pleaſe*. Went. Off. Ex. 41.

3 *Several executors were named* in the will, and *one refuſed*, and *the other acted*, and *thoſe that acted died*, and *adminiſtration was committed to J. S. before any refuſal by the ſurviving executor*. The *adminiſtration was* held to be *void*, becauſe the ſurviving executor might, notwithſtanding his former refuſal, have taken upon him the executorſhip; and *afterwards on another refuſal before the ordinary by the ſurviving executor, adminiſtration was committed* to the Ld. Petre, *and was held to be good*, and upon that title he maintained in B. R. an action of trover for a jewel. 1 Salk. 307, 308. per Holt Ch. J. in delivering his opinion, cites it as before a commiſſion of delegates in Serjeant's Inn in Ld. Petre's caſe.

1 Salk. 311. pl. 15. 19 December 1711. Houſe and Downs v. Ld. Petre, S. C. held accordingly; but that the civilians held, that by the civil law a renunciation is peremptory.

4. Where there are two executors and one renounces, *he is ſtill at liberty to accept* the executorſhip; *otherwiſe where both renounce*, though in this matter the common lawyers differ from the civilians, the latter holding that a renunciation once made, though only by one of them, is peremptory. 3 Wms.'s Rep. 251. Paſch. 1734. Robinſon v. Pett.

## (U. b) Refuſal by one. Pleadings.

1. *DEBT againſt adminiſtrator*, and *counted that the adminiſtration was committed to him by the biſhop of Sarum at B. in the county of W.* The *defendant ſaid, that the biſhop bailed the letters of adminiſtration to him, and that he ſaid that he would be adviſed by three days, and ſee the goods of the inteſtate, and ſo he did, and returned the third day and refuſed to take the charge, and re-bailed the letters, abſque hoc that he adminiſtered in any other form*, and no plea; for he confeſſes no adminiſtration; therefore he *ought to ſay that he did not adminiſter*. Br. Adminiſtrator, pl. 31. cites 37 H. 6. 27, 28.

2. *But* it is a good plea *that the adminiſtration was committed to the plaintiff and one J. S. who was not preſent, and that the defendant ſaid that he would take the adminiſtration if the other would agree, and after the other diſagreed*; this is a *good plea with a traverſe* ut ſupra; for this was conditionally, for *he cannot traverſe in other manner if he does not confeſs any manner of adminiſtration*, as about funerals, or that ſhe was the wife of inteſtate, and took her neceſſary apparel to her body, abſque hoc that ſhe adminiſtered in another manner, for there is adminiſtration confeſſed, but not ſuch adminiſtration as ſhall charge; quod nota per opinionem Curiæ. Ibid.

3. Debt againſt executor who pleaded refuſal, he was compelled to *ſhew before whom*, who ſaid before his own commiſſary; [ 420 ]

for it was the archbiſhop of Canterbury himſelf, and then weſt. B. Pleadings, pl. 37. cites 9 E. 4. 24. 33.

4. If there are *divers executors* of one will, and *one* of them *refuſes to prove* the will, he *may plead* ne unques executor; per Roll Ch. J. at a trial at bar. Sti. 343. Mich. 1652. Cheeſman v. Turner.

## (W. b) Executors or Adminiſtrators of Executors or Adminiſtrators. What they ſhall have.

1. THE teſtator made A. and B. his executors, and *deviſed that his executors ſhould receive the iſſues and profits of his lands till his ſon and heir be twenty-one, to pay his debts and legacies, and to educate his children.* A. died, and ſo did B. during the minority of his ſon, having firſt made T. S. his executor. Catline Ch. J. Saunders Ch. B. and Brown and Dyer held, that the *executor of B. the ſurvivor may diſpoſe of the iſſues and profits for the purpoſes mentioned in the will during the infancy of his ſon;* becauſe it was not only a bare authority or confidence, but an intereſt veſted in the executor by the deviſe. Dyer, 210. a. b. pl. 24. Hill. 4 Eliz. Stile v. Tomſon.

2. If an *adminiſtrator has judgment and dies, his executors cannot have execution of the ſaid judgment;* for none ſhall have execution of this judgment, but he who ſhall be ſubject to the payment of the debts of the firſt inteſtate, which the executors are not; and judgment accordingly. 5 Rep. 9. b. Trin. 34 Eliz. B. R. in Brudenell's caſe.

3. Nota, it was ſaid that there is a *difference between an executor's and an adminiſtrator's dying inteſtate;* that in the firſt caſe the *adminiſtrator of the executor ſhall have the goods of the firſt teſtator,* eſpecially where it was ſaid (the reſidue after my debts, &c. I give, &c.) Sid. 79. in pl. 3. Trin. 14 Car. 2. cites Dyer. *But* that *the adminiſtrator of the adminiſtrator ſhall not* have the goods of the firſt inteſtate unadminiſtered.

2 Freem. Rep. 181. pl. 248. S. C. and ruled that whoever gets any of the teſtator's eſtate into his hands, is anſwerable for the legacies.

4. A. bequeaths a legacy to J. S. and makes *B. and C. his executors* and dies, *B. makes C. and D. his executors* and dies; J. S. ſues C. and D. for his legacy. D. demurs, for that the ſurviving executor of A. was only liable to his legacies, and D. being executor to one of A.'s executors who died firſt, and leaving the other executor ſurviving, was not privy nor accountable for A.'s eſtate; this is true in point of law; yet inaſmuch as it was *charged that D. had gotten the eſtate of A.* the demurrer was overruled, the Court declaring that A.'s eſtate in whoſe-ever hands, ought to be liable to his legacies, and decreed. Chan. Caſes, 57. Trin. 15 Car. 2. Nicholſon v. Sherman.

5. Debt on bond in C. B. againſt an adminiſtrator who *waſtes goods and dies inteſtate,* leaving goods to the value of 500l. and debts of his own to that value, a *ſci. fa.* is brought on the new ſtatute

ſtatute againſt his adminiſtrator, and he pleads payment of that 500l. for debts on ſimple contracts of his inteſtate, and held good, and judgment for defendant, becauſe the waſting is the charge, and that is of no higher a nature, and by that ſtatute he is to be in the ſame caſe with his inteſtate, and he might have paid his own debts therewith. 2 Show. 485. pl. 447. Mich. 2 Jac. 2. B. R. Britton v. Buckworth.

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6. If executor proves the will, his executor ſhall be executor to the firſt teſtator. 1 Salk. 309. Hill. 1 Ann. B. R. in caſe of Wankford v. Wankford.

As immediate executor, Pl. C. in caſe of Chapman v. Dalton.

7. *Two executors died, leaving each an executor.* It was firſt decreed that they ſhould be anſwerable only reſpectively for the *receipts of their ſeveral teſtators*, but upon a rehearing the Court charged each with the whole. Wms.'s Rep. 82. Arg. cites it as twice heard before Ld. Somers. Widmore v. Bond.

## (X. b) Actions by Executors of Executors. Or againſt them. And Pleadings.

1. 25 *E.* 3. *ſtat.* 5. *cap.* 5. *Executors of executors ſhall have actions of debts, accompts, and of goods carried away of the firſt teſtator's, and execution of ſtatutes merchant and recognizances made to him, as the firſt teſtator might have had, if he was alive; and executors of executors ſhall be anſwerable to others for as much as they have recovered of the goods of the firſt teſtator, as the firſt executors ought to have done.*

The chief purview of this ſtatute was for the actions of account and treſpaſs of goods carried away, which executors could not have by the common law, till given by ſtatutes and by equity, were not extended to executors of executors, but the action of debt was put into the ſtatute of neceſſity, for the law gave it to the executor of an executor before, but to take away the doubt which ſome had of it; and ſo an executor of an executor may have all actions which the common law gave to the firſt executors, and ſo might have actions of covenant, but if not, they may have all actions which the common law gives to the firſt executor, and ſo may have actions of covenant, and if not they may have it by the equity of the ſtatute of 25 E. 3. cap. 5. Pl. C. 290. a. b. Trin. 7 Eliz. in caſe of Chapman v. Dalton. —— 2 Inſt. 404. S. P.

2. Waſte againſt executor, and becauſe it was *brought againſt the defendant, as executor of the leſſee, where he was executor of the executor of the leſſee*, therefore upon this exception the writ was abated, quod nota. Br. Waſte, pl. 75. cites 33 E. 3. 17.

3. If *treſpaſs* be done *to the goods of teſtator, in the hands of the executor*, if the executor after dies, his executor ſhall not have treſpaſs for it, but *moritur cum perſona*. 2 Roll. tit. Treſpaſs, (O. a), pl. 1. cites 18 H. 6. 22. b. contra.

4. By the common law, executors of executors *cannot have action* as the firſt teſtator. Br. Teſtament, pl. 1. cites 19 H. 8. 9.

5. Note, where *executor recovers, and dies inteſtate*, and the *ordinary commits the adminiſtration of his goods and of the firſt teſtator to J. S.* he ſhall have execution as adminiſtrator of the teſtator, and not as adminiſtrator of the executor; per Jenour; for now is the firſt teſtator dead inteſtate; contra per Fitzherbert, for then he

ſhall loſe the advantage of the recovery as executor, quod nota. Br. Adminiſtrator, pl. 1. cites 26 H. 8. 7.

6. Executor of executor ſhall be as executor immediate to the firſt teſtator, ſo that a *deviſe of teſtator's goods by the firſt executor is void*, and the ſecond executor ſhall take them, even though he aſſented to the legacy. Pl. C. 526. Trin. 19 Eliz. Bramſby v. Grentham.

a Le. 208. pl. 336. S. C. in totidem verbis.

7. *B. executor of A. died before probate, and made C. his executor, and is ſued as executor of A.* for a debt due by A. and not as executor of B. Per two J. againſt Wray, the writ is good. Le. 275. pl. 370. Mich. 26 Eliz. B. R. Powley v. Sier.

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8. B. brought debt againſt P. executor of the will of E. executrix of the will of A. The defendant pleaded, they had fully adminiſtered the goods of his teſtator E. upon which they were at iſſue, which was found for the plaintiff; and it was moved in arreſt of judgment, that there is not any iſſue joined, which anſwers to the action, for the action is brought againſt the defendant in the quality of the executor of an executor, and the verdict extends to the defendant but as executor of the ſaid E. for it is found by it that the defendant hath fully adminiſtered the goods of his teſtatrix, without any inquiry of the adminiſtration of the goods of the firſt teſtator A. in which capacity the defendant is charged; ſo as here the *writ charges the defendant in the quality of an executor of an executor, and in reſpect of the firſt teſtator, and the iſſue and the verdict doth concern the laſt teſtator*, the Court ſhall give judgment as upon a nihil dicit, in which caſe the *execution of the judgment ſhall not fall upon the goods of the laſt teſtator, according to the verdict, but ſhall follow the nature of the action which was brought againſt the defendant, as of an executor's executor.* Le. 68. pl. 89. Mich. 29 & 30 Eliz. C. B. Barker v. Pigot.

9. If executor of executor brings *debt in the name* of the firſt executor, for a debt due to the firſt teſtator, the writ ſhall abate. Le. 155. pl. 216. Trin. 32 Eliz. C. B. Ivory v. Fry.

10. An executor of an executor ordered to *account upon oath*, and to be examined upon interrogatories *to diſcover the eſtate*. Toth. 150, 151. cites 6 Jac.

11. An *executor ſues the executor of his co-executor*, towards payment out of an eſtate which came to the defendant, who is not chargeable in law with the legacies, but the plaintiff is (as ſurviving executor) decreed to be liable. Toth. 152. cites 10 Jac. Allen v. Burton.

12. Two executors; the *one truſteth the other to receive all rents, and dies*; the plaintiff calls his executor to an account, being the executor of a truſtee; ordered to make ſatisfaction. Toth. 152. cites 12 Jac. Capell v. Goſtow.

13. Executor of an executor may have *debt on eſcape* againſt the ſheriff of an eſcape of one taken in execution by virtue of a judgment obtained by the firſt executor. Godb. 262. pl. 361. Mich. 13 Jac. B. R. in caſe of Lambert v. Slingſby.

b Cro. J. 614. pl. 6. Hayron v.

14. A. makes B. his executor, and dies, [and then B. makes C. his executor, and dies without proving the will,] and in action of *debt*

*debt againſt C. as executor of B. executor of A.* C. pleads that he had *renounced the executorſhip of B.* But per Cur. he ought to be executor to both or to none, for by Hobert, quod lex conjunxit nemo ſeparet. Noy, 30. Wolfe v. Hayton. Wolfe, Paſch. 18 Jac. B. R. the S. C. held that he might aſſent to be executor to one teſtator [as to C.] and refuſe to the other [viz. B.], for the wills are ſeveral; and ſo a judgment in C. B. was affirmed. —— Palm. 156. S. C. adjudged accordingly. —— Hutt. 30. Wolfe v. Heydon, S. C. adjudged. ——— Executor of an executor may renounce being executor to the firſt teſtator, but if he does not renounce he is executor of courſe. Per Holt. 1 Salk. 309. Hill. 1 Ann.

15. The executor of an executor is executor to the firſt teſtator, and may have an action of *debt for the arrearages of an annuity due unto him.* Finch's Law, 173.

16. If *A. recovers a debt as executor of J. S. and makes B. his executor, and dies before execution ſued, B.* is not put to a new ſuit, but *may have execution* upon that judgment; *but if A. or B. died inteſtate,* now could none as adminiſtrator to either of them, nor as adminiſtrator of J. S. have execution of this judgment; for the former has no intereſt in any thing pertaining to J. S. and the latter comes to title above the judgment, viz. as immediate adminiſtrator to J. S. who is now dead inteſtate, and derives no title from the executor who recovered. Went. Off. Ex. 103. [ 423 ]

17. *Leſſee for 99 years made leaſe for 40 years, rendering rent, and made A. his executor, and died. A. proved the will, and made B. his executor. The rent incurred. A. died.* B. proved the will, and avowed for this rent in jure proprio. Reſolved, that by the common law B. may diſtrain for this rent by reaſon of the reverſion, which makes a privity, though it was objected, that for rent in teſtator's time he ſhall have debt, and not diſtreſs; and that the avowry by the executor in jure proprio is good; and ſo, though he did not ſay that the firſt executor died poſſeſſed thereof. Lat. 211. Mich. 22 Jac. Wade v. Marſh.

18. Bill by the *reſiduary legatees* of the firſt teſtator againſt an executor of an executor for an *account,* decreed accordingly. Finch. R. 39. Mich. 25 Car. 2. Shrimpton and Holdway v. Holman.

19. Plaintiff *declared againſt the defendant as executor of E. N. who was executor to the debtor;* the defendant *pleaded that the debtor died inteſtate, and that adminiſtration was granted to a ſtranger, abſque hoc that E. N. was ever executor to the debtor,* but did *not ſay, or ever adminiſtered as executor,* whereas in truth he was executor de ſon tort. The plaintiff *replies, that before adminiſtration granted to the ſtranger, E. N. poſſeſſed himſelf of divers goods of the ſaid debtor, and made the defendant executor, and died;* and upon a demurrer judgment was given for the plaintiff, but reverſed; for an executor of an executor de ſon tort is not liable at law, though the Lord Chancellor ſaid he would help him in equity. But here the adminiſtration of the goods was granted before the death of the executor de ſon tort, and ſo his executorſhip vaniſhed, and nothing ſhall ſurvive. 2 Mod. 293. Hill. 29 & 30 Car. 2. in Cam. Scacc. before the Lord Chancellor, Ld. Treaſurer, and the 2 Chief Juſtices. Anon.

Extends to administrator of rightful executors, 3 Mod. 114.

20. 30 Car. 2. cap. 7. ſ. 2. *Executors and adminiſtrators of any who, as executors, or executors in their own wrong, or adminiſtrators, ſhall waſte or convert the eſtate of any perſon deceaſed to their own uſe, ſhall be chargeable as their teſtator inteſtate would have been, if living.*

Hill. 2 Jac. B. R. Holcomb v. Petit. —— 2 Show. 485. —— See Went. Off. Ex. 161. where it is ſaid that it was ſo held long before this ſtatute, viz. 31 & 32 Eliz. T. Mich. and Tr. 34 Eliz. in caſe of Walter v. Sutton.

21. 4 & 5 *W. & M. cap.* 24. *ſ.* 12. *Executors and adminiſtrators of executors, or adminiſtrators of right, who ſhall waſte or convert to their own uſe the goods or eſtate of his teſtator or inteſtate, ſhall be chargeable, as their teſtator ſhould or might have been.*

## (Y. b) What muſt be firſt applied to pay Debts and Legacies.

1. *LEASE was aſſigned to pay* debts and legacies, the *perſonal eſtate bequeathed to A.* by the ſaid will, ſhall not be ſubject or liable to the ſaid debts or legacies. Chan. Rep. 45. 6 Car. 1. Peacock v. Glaſſcock.

[ 424 ] 2. *A. on the marriage of B. his daughter to C. agreed to give* 600*l. A. died, and left aſſets, and* 600*l. ſecured by a mortgage to A.*—C. had obtained a verdict and judgment at law againſt the executors, and now brought his bill. Decreed, the executors to account, and that the *perſonal eſtate* be liable *firſt*, and if that fall ſhort, then the principal and intereſt due on the ſaid *mortgage*, after real incumbrances are taken off, ſhall be liable to make it good. Fin. Rep. 236. Mich. 27 Car. 2. Bridgman v. Tyrer.

3. If *lands* be *deviſed for the payment of debts and legacies*, and the *reſidue of the perſonal eſtate* be given *to the executors after the debts and legacies paid*, the *perſonal eſtate ſhall, notwithſtanding, as far as it will go, be applied to the payment of the debts*, &c. and the land charged no further than is neceſſary to make up the reſidue. 2 Vent. 349. Paſch. 32 Car. 2. in Canc. Anon.

4. An executor or truſtee *ſhall not pay off a mortgage out of the monies ariſing by ſale of other lands, directed to be ſold for payment of debts*, becauſe the mortgagee can have no damage, being ſecured by his mortgage; but if the mortgagee ſhould be paid thereout, the other creditors might loſe their debts. 2 Freem. Rep. 51. pl. 56. Paſch. 1680. Povye's caſe.

5. If a *man makes a leaſe, or deviſes an eſtate for years (he being ſeiſed of an eſtate of an inheritance) for payment of debts*, if the *profits of the land ſurmount the debt*, all that remains ſhall go to the heir, though not ſo expreſſed, and albeit, it be in the caſe of an executor. 2 Vent. 359. Mich. 33 Car. 2. in Canc. Anon.

6. A. *by will gives* 20*l. to B. and makes him executor, and gives his real eſtate to C. paying his debts and legacies, and in default of payment within ſuch a time, the legatees and creditors to enter and to hold till paid*, and *makes no expreſs diſpoſition of the ſurplus of the perſonal eſtate.*

*eſtate.* The perſonal eſtate ſhall be applied in caſe of the real. 2 Vern. 120. pl. 121. Hill. 1690. in caſe of Mead v. Hide.

7. *A. mortgages lands to B. and afterwards upon marriage ſettles the ſame on himſelf for life, to his wife for life, remainder to the heirs of his body by his wife.* Afterwards *A. mortgages the ſame lands to C. and makes affidavit that they were free from incumbrances.* A. dies inteſtate, leaving a ſon. D. adminiſters to A. during the minority of the ſon, and out of A.'s perſonal eſtate pays off the firſt mortgage, and takes an aſſignment in truſt for the ſon. Decreed, the adminiſtrator ſhall not be allowed, as againſt the ſecond mortgagee, what he paid in diſcharge of the firſt mortgage. 2 Vern. 304. pl. 295. Mich. 1693. Fox v. Crane and Wight.

8. *Deviſe of real eſtate to truſtees and their heirs, to be ſold for the payment of debts and legacies, and gives ſeveral legacies and 200l. to B.* The *will is executed according to the ſtatute.* Then *by a codicil he gives 1000l. more to B. but* the codicil *is neither executed or ſigned by him.* Maſter of the Rolls ſaid, *this deviſe is a total diſheriſon of the heir*, and the whole is out of him, and the reſiduum is money (which was given away). The codicil is a good appointment, and the money raiſed by ſale of the real eſtate, being a fund for payment of debts, and the reſiduum of the perſonal eſtate being given alſo away, the perſonal eſtate, given as ſuch, is freed from the debts, without negative words. Trin. 6 Geo. Bowerſby v. Bowyer.

9. If *I charge all my lands with payment of my debts, and deviſe part to A. and other part to B.* &c. the creditors cannot be paid out of the lands till the maſter has certified what the proportion is, which each deviſee is to contribute; but *if the maſter certifies that the debts will exhauſt the whole real eſtate*, then the *creditors may proceed againſt any one deviſee for the whole.* 3 Wms.'s Rep. 98. Hill. 1730. Harris v. Ingledew.

10. If one *deviſes all his perſonal eſtate to his daughter, and all his* [425] *real eſtate to truſtees*, in truſt to pay debts, &c. *remainder to his daughter in tail, remainder over*, the perſonal eſtate ſhall in the firſt place be all applied to pay the debts. 3 Wms.'s Rep. 324. Trin. 1734. Haſlewood v. Pope.

11. *Expreſs words, or words tantamount*, are requiſite to exempt the perſonal eſtate from payment of debts; per Ld. Chancellor. 3 Wms.'s Rep. 325. Trin. 1734. Haſlewood v. Pope.

12. One *dies indebted by bond*, and ſeiſed in fee of divers land, part of which he deviſed to J. S. and other part he permits to deſcend to his heir; the lands deſcended ſhall in the firſt place be liable to pay the bonds. 3 Wms.'s Rep. 367. Trin. 1735. Chaplin v. Chaplin.

The reporter here adds the following note: The reaſon why, where a man dies indebted by bond and deviſes ſome lands to J. S. and leaves other lands to deſcend to the heir at law, not mentioning them in his will, the lands deſcending to the heir ſhall be firſt applied to pay the bond debts, is, becauſe the applying the lands deviſed to J. S. to pay the bond debts would diſappoint the will, which equity will not permit if it can be avoided; whereas it no way diſappoints the will to ſay, that the lands not mentioned ſhould be in the firſt place liable to pay the debts; but it ſeems it would be otherwiſe if the teſtator had deviſed the lands though to his heir at law, for though ſuch deviſe were void (as to the purpoſe of making the heir take by deſcent), yet it ſhews the teſtator's intent that the heir ſhould have this land, and therefore (I take it) the deviſed lands to J. S. and the other lands deviſed to the heir at law, ſhall in this laſt caſe contribute in proportion to pay the bond debts; alſo for the above-mentioned reaſon, (I ſhould think,) the land permitted to deſcend to the heir at law, and not mentioned

mentioned in the will, ſhall be applied to pay the bond debts before a ſpecific legacy, leſt otherwiſe the teſtator's intention ſhould be diſappointed. Ibid.

13. Every mortgage, though no covenant or bond to pay the money, implies a loan, and every loan implies a debt; and therefore an *heir of a mortgagor ſhall compel an application of the perſonal eſtate to pay off a mortgage, notwithſtanding there was no covenant*, &c. from the mortgagor. 3 Wms.'s Rep. 358. pl. 96. Trin. 1735. King v. King and Ennis.

## (Z. b) Equity. In what Caſes Executor or Adminiſtrator muſt be made a Party.

1. A. *Covenants for himſelf and his heirs*, that a jointure-houſe ſhall remain to the uſes in the ſettlement. The jointreſs brings a bill againſt the heir for performance. The defendant demurs, for that the executor ought to be a party. Reſolved, that though at law the creditor may ſue the heir only, where the heir is expreſsly bound, yet as the perſonal eſtate is the natural fund to pay all debts, as the executor may make it appear that he has performed the covenants, the *executor muſt be made a party in equity*. 3 Wms.'s Rep. 331. pl. 86. Mich. 1734. Knight v. Knight.

2. In a *bill* brought by a *mortgagee againſt the heir of a mortgagor to foreclose*, it was objected, that the executor of the mortgagor ought to be a party, becauſe it did not appear but that he might have paid the debt; but by the Maſter of the Rolls, (in the abſence of the Lord Chancellor,) and Goldſborough the Regiſter, there is no neceſſity for making the executor of the mortgagor a party; becauſe the bill being only to foreclose the equity, the plaintiff need only make him a party that has the equity, viz. the heir, and the courſe is ſo; neither is the plaintiff, the mortgagee, any ways bound to intermeddle with the perſonal eſtate, or to run into an account thereof, and if the heir would have the benefit of any payment made by the mortgagor or his executor, he muſt prove it, and cites DUNCOMB v. HANSLEY, Paſch. 1720. So note the diverſity between the caſe above reported of Knight v. Knight, and this laſt, for there the bill was to recover ſatisfaction in damages for want of repairs, &c. and the perſonal eſtate is the natural fund for that purpoſe; but here the bill was not to recover the debt, but only to bar the equity of redemption. 3 Wms.'s Rep. 333. Mich. 1734. a note of the reporter at the end of the caſe of Knight v. Knight,

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3. In a bill for an account of the perſonal eſtate of J. S. though the perſon who has a right to adminiſter to J. S. be a party, yet this is not ſufficient without *adminiſtration actually taken out*. 3 Wms.'s Rep. 349. pl. 92. Hill. 1734. Humphreys v. Humphreys.

## (A. c) Decrees on Executors.

1. *TWO hundred marks were delivered to A. to keep and deliver to his executors or adminiſtrators after his death to diſpoſe for his ſoul*, and *A. delivered the* 200 *marks to B. to keep and re-deliver to A. when he ſhould require*, and he who firſt delivered made executors and died; the *executors or adminiſtrators ſhall have ſubpœna* againſt A. to ſue the bond againſt B. to have livery of the money, becauſe the bond was made to the uſe of the owner who firſt delivered the 200 marks. Br. Conſcience, pl. 10. cites 4 E. 4. 37. Br. Obligation, pl. 49. cites S. C. —Br. Prohibition, pl. 11. cites S. C.

2. A bill was againſt the defendant as *executor to* their father, who in his life-time being *guardian in ſocage* to the plaintiff *in right of the plaintiff's mother, whom he married, for* and concerning *profits* by him taken *of the lands* of the plaintiff during his minority for fines of leaſes, woodſales and wilful decay of houſes, and doth aver aſſets ſufficient to be come to their hands; the defendant demurred becauſe not privy nor chargeable by law, but ordered to anſwer. Cary's Rep. 76, cites 18 & 19 Eliz. Burgh v. Wentworth.

3. A ſuit was for certain *rents, fines, and woodſales, received* by the defendant's teſtator *during the plaintiff's* minority; it appears that if the plaintiff had made good proof he was to be relieved, therefore a commiſſion is awarded by conſent. Cary's Rep. 162. cites 21 Eliz. Borrough v. A. B.

4. Executors are *not* in equity *compelled to put in bond to perform the will* or anſwer legacies, *unleſs it appear they have either broken the truſt* in them repoſed by the teſtator, *or be decayed ſince his death*, for at his death it ſeemed he truſted them without bond. Toth. 150. pl. 1. 32 Eliz. Brown v. Purton.

5. A *bill* preferred *againſt the executor of one that committed waſte*, demurred unto and good. Toth. 153. 15 Car. Conway v. Crooke.

6. The *huſband by will gave his lands, goods, &c. after his debts paid, and* 100 *l. a piece to his five daughters at their ages of* 20 *years*, and *all the reſt he gave to his wife, whom he made executrix.* The *premiſes not being ſufficient to raiſe money to pay* the debts and legacies *at the prefixt days*, the Court conceived that this amounted to a deviſe to ſell, and *decreed the executrix to ſell* and pay the plaintiff, but before ſhe ſhould receive any part of the purchaſe-money ſhe was to *give ſecurity to pay the daughters portions* at their reſpective ages, and they when of age to releaſe to the purchaſor. Chan. Caſes, 179. cites 16 Car. 2. Hughs v. Collis.

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7. Executor decreed to *give ſecurity for a legacy* on a ſuggeſtion of waſting the eſtate. Chan. Caſes, 121. Hill. 20 & 21 Car. 2. Duncamban v. Stint. After a peremptory mandamus] by the Court of B. R. to the ſpiritual court to grant a probate, a bill was filed in Chancery againſt the executor, who being a legatee, the Court upon a ſuggeſtion of inſolvency injoined him from intermeddling with the aſſets any further than to ſatisfy the legacy given to himſelf, he being in equity only a truſtee for the plaintiff. Carth. 458. Mich. 10 W. 3. The King v. Sir Richard Raines.

8. Executor

8. Executor decreed to pay *arrears of rent* where the lands out of which it iſſued were not known or diſtinguiſhed, and which the teſtator's perſon was not liable to. Ch. Caſes, 121. Hill. 20 & 21 Car. 2. Eaton College v. Beauchamp and Riggs.

9. The *teſtator made his will*, and J. S. executor, and *afterwards declared his will to be, that T. ſhould have a bond of* 100 *l. which he owed to him*, and died; J. S. *proved the will, but not this codicil*, and then T. exhibited his bill in the Exchequer againſt J. S. to compel him to prove the codicil; pending which the bond was ſued at law, and to have the benefit of this bequeſt, and to be relieved in the premiſes; on proof whereof it was held by the Court, that *no relief* lay for this legacy before *the codicil was proved in the eccleſiaſtical court*, but that afterwards it was proper for relief by reaſon of the legacy. Hardr. 96. Paſch. 1657. in the Exchequer. Tooke v. Fitz-John.

10. *Ceſtuy que truſt* of a perſonal eſtate *may ſue* in Chancery to *have an account* againſt the executor or adminiſtrator, and *at the ſame time ſue in the prerogative court* to enforce executor or adminiſtrator *to bring in an inventory*. Per Ld. Keeper. 3 Chan. Rep. 72. 4 Dec. 1671. Digby v. Cornwallis.

11. Bill *againſt adminiſtrator of an executor* for a *legacy* given to the wife of the plaintiff, who by articles was to make a ſettlement of lands, and part of her portion on her, which he was ready to do, decreed an account of teſtator's perſonal eſtate. Fin. Rep. 70. Hill. 25 Car. 2. Nott v. Thynn.

12. The will directed the reſidue of the perſonal eſtate, after debts and legacies paid, to be put into the chamber of London for the benefit of her ſon, but the executor *carried on a trade* in brewing *with teſtator's ſtock*; decreed an *account of the profits* of the trade as well as the perſonal eſtate, and for what money he employed of his own in the trade to be allowed 6 per cent. but his *labour and pains* to be conſidered when the maſter ſhall make his report. Fin. Rep. 381. Trin. 30 Car. 2. Luntley v. Royden & al'.

13. Executor decreed *to execute a releaſe*. Fin. Rep. 423. Trin. 31 Car. 2. Powell v. Stakes.

14. Executor decreed *not to lend money* hereafter *without leave of the Court*, and ſuch monies as he hath lent he ſhall *diſcover the ſecurities* to the plaintiff, and if he likes them, and ſo declares his acceptance, then the plaintiff ſhall have the *future intereſt* of the money lent, elſe not. 2 Chan. Caſes, 21. Hill. 31 & 32 Car. 2. Groveſnor v. Cartwright.

15. If an executor hath orphan's or other men's money in his hands, and hath power to lend it, if he *lends it and takes ſecurity in his own name* which fails, he ſhall anſwer the debt of his own money, unleſs that he indorſe the bond, or do ſome other thing at the time of lending the money or taking the ſecurity which may doubtleſs declare the truth, &c. 2 Chan. Caſes, 57. Trin. 33 Car. 2. in caſe of Daſhwood v. Elwell.

[428] 16. An *executor pleaded fully adminiſtered* to an action brought againſt him; whereupon the *plaintiff preferred his bill* in this Court for

*for diſcovery of aſſets;* and *whilſt the ſuit was depending* in this court *the executor confeſſed judgment to another perſon;* this court cauſed him to pay the whole debt, for that the party ſhould not ſuffer by an act that was done to defraud him whilſt he was proceeding in this court. 2 Freem. Rep. 93. pl. 103. Paſch. 1685. in Canc. Cited by the Solicitor General as the caſe of Patrick v. Dee.

17. Where the teſtator's eſtate was great, and the debtors poor, but propoſe to pay as far as they are able, decreed the executors to be at *liberty to compound* any debts owing to the ſaid eſtate if they ſhould think fit. 2 Chan. Rep. 395. 2 Jac. 2. Griffith v. Jones. 2 Freem. Rep. 96. pl. 106. S. C. but S. P. does not appear.

18. The teſtator *deviſed a legacy to his child, an infant, payable at the age of* 23, and *made his wife executrix, ſhe marries a ſecond huſband and dies,* and *he takes adminiſtration de bonis non* with the will annexed, his wife being reſiduary legatee; bill ſuggeſts his inſolvency, and prays that he might *give ſecurity* to pay the legacy when payable, and decreed accordingly. 2 Vern. 249. Mich. 1691. Rous v. Noble.

19. An *adminiſtrator writes a letter* to his inteſtate's creditors, viz. *I promiſed to pay you what money was due to you before I went out of town, but it will be a kindneſs to me if you will ſtay till next winter; but if not, I will endeavour to pay you.* Per Cur. promiſe to pay on forbearance before the ſtatute of frauds was accounted a good conſideration to charge the executor or adminiſtrator de bonis propriis, and ſince a writing is ſufficient after a parol promiſe, and by this letter *it appears that the adminiſtrator had made a promiſe, and confirmed it by this letter;* ſo decreed that the adminiſtrator ſhould be bound by the promiſe, and ſhould anſwer debts and coſts out of his own eſtate, but have ſatisfaction out of aſſets if any. Hill. 1715. Frederick v. Wynne.

20. *Executor* having received *of a debtor of teſtator more money by miſtake than was really due, and paid it away to creditors* of his teſtator, he muſt *refund,* and may ſue the creditors to whom he by miſtake had paid the ſame, to refund, but then it ſeems the debtor ought not to be dilatory, and thereby draw the executor into a ſnare. Wms.'s Rep. 355. Trin. 1717. Pooley v. Rais.

21. *Executor brings a very frivolous bill,* which was diſmiſſed with coſts out of aſſets; ordered to be *examined on interrogatories if he denies aſſets;* and ſo it was done in another cauſe the next day. Sel. Caſes in Chan. in Ld. King's Time, 62. Mich. 12 Geo. Cole v. Rumney.

22. A father *left a great perſonal eſtate to two infant children, and made his wife executrix;* a bill was brought in the infants names by a relation as prochein amy, to call the mother to an account. On affidavits of ſeveral other relations, that this *ſuit in the infants names was out of pique,* and not for the infants good, the Court referred it to a maſter, who reporting the matter to be ſo, the ſuit was ſtayed. 3 Wms. 140. Paſch. 1732. Da-Coſta v. Da-Coſta.

23. Where the will does not require that the executor ſhall give ſecurity, it is not uſual for the Court to inſiſt on it until ſome miſbe-

miſbehaviour; but where *one by will charged the reſidue of his perſonal eſtate with 40l. per ann. to his wife to be paid quarterly*, the executor was ordered to bring before the maſter ſufficient in bonds and ſecurities to be ſet apart to ſecure this annuity. 3 Wms.'s Rep. 336. Mich. 1734. Slanning v. Style.

[429] (B. c.) Favoured and indemnified, or charged.

In what Caſes more or leſs in Equity than elſewhere.

1. IF executor *ſells goods for a ſmall matter*, and upon debt brought againſt him by a *creditor*, he pleads fully adminiſtered, the *increaſe of the value* may be given *in evidence*. Jenk. 189. pl. 89. cites 20 H. 7. Kelw. 64.

2. If there are *ſeveral creditors*, and the executor *delivered all the goods to one* creditor for his debt, another creditor may *aver that the goods were worth more*. Jenk. 189. pl. 89.

3. Though executors ſhall not *find bail* in ordinary caſes, yet in ſpecial caſes they ſhall, as if it appeared that they have *waſted* the goods, &c. Lev. 39. Trin. 13 Car. 2. B. R. Anon.

4. Executors, by *conſent of friends and truſtees*, paid *orphan's money* in the hands of Sir W. B. guardian, who gave ſecurity to the court of aldermen, but afterwards proved *inſolvent*, the executor ſhall not be charged. 2 Chan. Rep. 9. 20 Car. 2. Beauchamp v. Silverlock.

5. Legacies payable within one year after teſtator's death, which being paſt, and the *legacies due, but the legatees infants*, the executor refuſes payment without being indemnified by the Court, decreed, the maſter to put out the money at intereſt, and the executor, complying with the decree, to be indemnified againſt the infants and all others. Fin. Rep. 94. Hill. 25 Car. 2. Dyke v. Dyke.

6. *Termor for years* dies *inteſtate*; adminiſtration is granted to B. who dies, and makes J. S. executor. *C. is adminiſtrator de bonis non*, and brings bill againſt J. S. for the original leaſe, and decreed accordingly. Fin. Rep. 59. Hill. 25 Car. 2. Preſtidge v. Preſtidge.

7. A. articles *to pay 6000l. to C. who acknowledged the receipt* of the whole, by 4000 l. being paid in money and lands, conveyed for the reſidue; but thoſe lands being ſettled on the wife for her jointure, and ſhe being made executrix, C. exhibited a bill againſt her for performance of the articles; but decreed, that the ſaid acknowledgment is an evidence of the performance of the articles, ſince C. made no further demand for ſeveral years, and it is unreaſonable to put an executor to *prove a preciſe payment after ſo many years*. Fin. Rep. 246. Hill. 28 Car. 2. D. of Newcaſtle v. Cleyton.

8. Bill *againſt an executor*, to exhibit a true *inventory* of the teſtator's perſonal eſtate, and *before he goes beyond ſea to give ſecurity* to

come to account for the ſame; defendant demurred, for that this bill ſeeks to make an injunction of this court to be in nature of a ne exeat regnum, and to make an executor give ſecurity, when at common law he is not to be held to bail; demurrer allowed. Fin. R. 257. Trin. 28 Car. 2. Bridge v. Hindall.

9. 29 *Car.* 2. cap. 3. ſ. 4. *No action lies to charge an executor on a ſpecial promiſe to anſwer damages out of his own eſtate, unleſs there be a note in writing ſigned by him or by his order.*

10. A. by articles agreed to pay J. S. 2000 l. for a purchaſe of land in Barbadoes, with covenants to enter into ſeven bonds for the payment of the money, each bond for 300 l. A. enjoyed the plantation, but no conveyance was made; J. S. died, and left B. and C. his executors in truſt for his ſon an infant; 600 l. was paid; B. *delivers up five bonds due*, and *takes bonds in his own and his co-executor's names*, and excuſeth himſelf becauſe A. had received a commiſſion to go to Surinam, &c. and ſo to mend the ſecurity he took the new bonds, but, by this, 500 *l. intereſt was loſt* to the infant. Ld. Chancellor decreed the payment to be according to the times of payment in the firſt article, and A. and B. to be charged therewith, notwithſtanding that B. on taking the new bonds had releaſed A. 2 Chan. Caſes, 235. Mich. 29 Car. 2. Hilliard v. George, &c. [ 430 ]

11. In the caſe of Lyndſey and Covil, it was admitted that an adminiſtrator or *executor* in ſome caſes, though he *committed a devaſtavit in law*, might be *relieved in equity*; as *an adminiſtrator in London before the fire, having leaſes of houſes, &c. and a great ſurplus of aſſets above* and beyond *what would pay debts and legacies, paid all as they were demanded*; and after *the fire coming deſtroyed the houſes*, which was the greateſt part of his aſſets, and then a debt upon *a bond ſtarted up*, and the adminiſtrator was relieved againſt this. 2 Freem. Rep. 1. pl. 1. Paſch. 1676. Croft's Executors v. Lyndſey.

12. Though the Court of Chancery does ſometimes compel executors to *give ſecurity for legacies*, yet that muſt be *where they are clear and beyond diſputes, and not* when the right is diſputable or *depends on a contingency*; per Lord Chancellor. 2 Freem. Rep. 41. Mich. 1678. in caſe of Dingly v. Dingly.

13. T. *gave three children* 200 *l. to be paid within a year after his death*; the executor brought his bill, and ſet forth, that *neither of the children was ten years old*, and that the teſtator died about a year ſince, and that the plaintiff was willing to pay the 200 l. ſo as he might do it ſafely, and be well diſcharged and indemnified; and complained that *the father ſued* him *in the conſiſtory court, to force him to pay the* 200 *l. to him, without giving the plaintiff any ſecurity againſt the children, their father being a butcher*; and the plaintiff inſiſted he could not be well diſcharged but by a decree in this court, where care would be taken to ſecure the money for the children, and for the plaintiff's indemnity and diſcharge. The defendant demurred, for that this matter was properly determinable in the conſiſtory court, where the matter depended, it being for a legacy. But the Ld. Chancellor declared, the ſuit was

2 Freem. Rep. 83. pl. 89. S.C. the demurrer was over-ruled.

was proper here; and that *if the matter had proceeded to a ſentence in the eccleſiaſtical court, it was proper to come here for the executor's indemnity*, and that here legatees were to give ſecurity to refund, but not there; and this court would ſee the money put out for the children, and ſo over-ruled the demurrer. Vern. 26, 27. pl. 24. Hill. 23 & 24 Car. 2. Horrel v. Waldron & al'.

14. A. bequeathed 500 l. to B. when he ſhould be twenty-four; *executor pays* 250 *l. at twenty-one* to put him out into the world, and gives *bond to pay the reſidue* at a day certain, at which time B. would be twenty-four; B. dies before twenty-four. Whether the 250 l. received ſhall be *repaid*, and the bond delivered up? Jeffries C. ordered the plea to ſtand for an anſwer, and decreed it was fit to be heard on the merits. Mich. 1687. 2 Vern. R. 31. Luke v. Alderne.

15. *Executor*, whoſe teſtator was greatly indebted, being deſirous to apply the aſſets as far as they would go, and that his payment might not be afterwards queſtioned, brought a bill *againſt all the creditors*, to the intent they might, if they would, conteſt each other's debts, and diſpute who ought to be preferred in payment; on demurrer held a proper bill, and a ſafe way for an executor to take. 2 Vern. 37. Hill. 1688. Buccle v. Atleo.

1 Vern. R. 92. S. C. cited.

16. An *executor* who, at the time of taking on him the executorſhip, had a good proſpect of advantage after debts and legacies paid, entered into a *recognizance* for payment of them. The teſtator's eſtate, which conſiſted of houſes in London, was afterwards deſtroyed by the fire of London; the Court, by reaſon of the *caſual loſs*, would not ſuffer that recognizance to run upon the executor, nor advantage to be taken thereof any further than he had aſſets in his hands. 2 Vern. R. 57. Paſch. 1688. cites as the caſe of Holt v. Holt.

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S. P. and injunction to ſtay judgment on certificate of the juſtices of aſſize. Cary's Rep. 69. North v. Kelwich.

17. Debt againſt executor on *bond for* 700 *l.* he pleaded *ne unques executor*. It appears on evidence that a chimney back, or another *matter of ſmall value, came to his hands*, and thereupon *verdict* paſſed againſt him; and the judges came into court and informed the Lord Keeper Bacon that this was the fact, and the party was relieved in equity. Cited per Hutchins Commiſſioner, in caſe of Robinſon v. Bell, Trin. 1690. 2 Vern. R. 147.

18. Action of *debt* brought againſt a widow of an alehouſe keeper who died inteſtate, ſhe pleaded *ne unques executor*; and all the proof againſt her was, that ſhe had *took money for ſome few pots of ale* after her huſband's death, and on hearing ſhe was relieved. Trin. 1690. 2 Vern. 148. in caſe of Robinſon v. Bell. Hutchins Commiſſioner cites it as the caſe of Cryer v. Goodhand in Ld. Nottingham's Time.

19. Executor ſent a letter to a creditor of the teſtator's owning a mortgage to teſtator for 300 l. The creditor afterwards brought debt on bond againſt the executor, who gave directions to his attorney to plead ſpecially, but he pleaded generally *plene adminiſtravit*; the *executor's letter owning the mortgage for* 300 *l.* was produced, on which *verdict* and *judgment* pro quer'. The executor brings his bill, and proves that there were three prior mortgages on

on the ſame eſtate, which before were unknown to him, ſo that the Court relieved the plaintiff, and the proceedings at law were ſtayed by injunction; per Commiſſioners. 2 Vern. R. 146. pl. 143. Trin. 1690. Robinſon v. Bell.

20. A. intruſted J. S. to diſpoſe of monies; A. dies, the whole not diſpoſed of; J. S. at the requeſt of A.'s executor *lends it out on a defective ſecurity*; the executor would have been intitled to one ſhare of the money, and M. to another ſhare; by the cuſtom of York the executor is not bound to *make it good* in this caſe, but againſt a *creditor* he ſhould; ſo it is of *goods ſold* bona fide to one that becomes *inſolvent* before all the money paid. Ch. Prec. 49. pl. 48. Mich. 1692. Gibbs v. Herring.

21. An executor or adminiſtrator as ſuch, *ſhall not avoid a fraudulent bill of ſale but when he is a principal creditor*; per Holt Ch. J. who ſaid that there is no doubt of this, but that when he is a principal creditor it may be doubtful; but however that will be conſidered in equity, but not here. Comb. 348. Mich. 7 W. 3. B. R. Orlebar v. Harwar.

23. Bill by adminiſtrator for relief after a *ſpecial plene adminiſtravit* pleaded, and verdict and judgment, pretending that his attorney without direction pleaded that the defendant (now the plaintiff) had no notice of the original till the 12th of March, and had then fully adminiſtered. Iſſue that defendant had notice before the 12th, viz. on the 6th of March, whereas he had in truth fully adminiſtered before the 6th of March, and in truth before the original purchaſed, ſo that *by the falſe plea by the attorney the right was never tried.* Maſter of the Rolls diſmiſſed the bill. Ld. Somers affirmed the diſmiſſion. Mich. 1695. 2 Vern. R. 325. Stephenſon v. Wilſon.

24. If in *trover* by executor for goods taken away, he *recovers leſs in damage than the value* of the goods, and that happens *not by his fault*, he ſhall anſwer for no more than he recovers; as if the goods are *periſhable goods*, and before any default in him to preſerve them, or ſell them at due value, they are impaired, he ſhall not anſwer for the firſt value, but ſhall give the matter in evidence to diſcharge himſelf; but if one *takes goods out of his poſſeſſion, he muſt ſue* the taker to have opportunity of diſcharging himſelf of anſwering more in aſſets than he recovers; ſo if executor *omits to ſell the goods at good price and they are taken from him*, there the value of the goods ſhall be *aſſets* in his hands, and not what he recovers, for there was a default in him. 6 Mod. 181. Trin. 3 Ann. B. R. in caſe of Jenkins v. Plume. [432]

25. Equity will not compel an executor to *give ſecurity*, without an *affidavit of miſbehaviour or inſolvency*. MS. Tab. February 20th, 1727. Dillon v. Shaen.

26. But in this caſe a *receiver was appointed, the executrix having married a perſon in needy circumſtances.* MS. Tab. S. C.

27. Where *bond creditors* have *ſatisfied themſelves out of the perſonal eſtate, and there is not enough to ſatisfy the creditors upon ſimple contract*, the juſtice of a *court of equity* is ſuch, that upon a bill exhibited of this matter by the inferior creditors, they *will relieve them*

*them out of the real eſtate*, ſo far as the ſuperior creditors might have had that relief; per Ld. Chancellor. But however he ſaid, the payment of itſelf would be good to the bond creditors, and the executor would be indemnified in making it; Barnard. Rep. in B. R. 207. Mich. 3 Geo. 2. Cromwell v. Griffith.

28. Though, generally ſpeaking, an executor or truſtee *compounding or releaſing a debt* muſt anſwer for the ſame, yet, if this appears to have been *for the benefit of the truſt eſtate*, it is an excuſe. 3 Wms.'s Rep. 381. Mich. 1735. Blue v. Marſhall & Ux'.

29. A perſon may bring *a bill in Chancery as adminiſtrator, before adminiſtration actually taken out*, though this would be an exception in an action at law; per Ld. Chancellor. Barnard. Chan. Rep. 320. Mich. 1740. in caſe of Fell v. Lutwidge.

## (C. c) Allowances to Executors.

1. EXecutors firſt ſhall have allowance of *funeral expences neceſſary* before all other things. Br. Executors, pl. 172. cites Dr. and Stud. lib. 2. fo. 76. cap. 10.

2. Executors are to be allowed *all charges they are put unto by the will, except ſuch as ariſe by their own default*. Cro. E. 347. pl. 19. Mich. 36 & 37 Eliz. B. R. in caſe of Pannell v. Fenn.

3. As to *proving the will*, a greater diſburſement (except for *riding-charges*, or, by reaſon of oppoſition, by a *caveat*, &c.) will not be allowable than is preſcribed by the ſtat. 21 H. 8. 5. which limits the fees. Went. Off. Ex. 130.

4. *Legacies* paid by *colour of a will*, which is after found to be *revoked*, *were* allowed. Chan. Caſes, 126. Paſch. 21 Car. Hele v. Stowell.

5. After a *ſuit commenced in Chancery*, an executor ſhall not be allowed any payment made voluntarily without ſuit. Vern. 369. pl. 362. Hill. 1685. Bright v. Woodward.

6. *Judgment confeſſed* by an executor, *pending a bill in Chancery*, ſhall not be allowed upon an account of aſſets. Vern. 457. pl. 433. Paſch. 1687. Surrey v. Smalley.

10 l. is enough to be allowed for the funeral of one in debt. Per Holt. Baron Powell in his circuit would allow but 11 s. 6 d. as all the neceſſary charges. Comb. 342. Trin. 7 W. 3. B. R. Anon.

7. In ſtrictneſs, no *funeral expences* are allowable againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers fees; but not for the pall and ornaments; per Holt. 1 Salk. 296. Trin. 5 W. & M. in B. R. Shelley's caſe.

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And a reaſonable allowance directed further for the maintenance of the infant. Ibid.

8. *Bond debts paid for the honour of the family* by an adminiſtratrix, without taking any aſſignments of them, and where the heir at law was her ſon, and but two years old, and died at ten, were allowed to her. 3 Ch. R. 161. Paſch. 7 Ann. Wallis v. Everard.

9. The Court never allows an executor or truſtee *for his time and trouble, eſpecially where there is an expreſs legacy for his pains*,

*pains*, &c. neither will it alter the caſe that the executor renounces, and yet is aſſiſting to the executorſhip; nor even though it appears that the executor has deſerved more, and beneſited the truſt to the prejudice of his own affairs. 3 Wms.'s Rep. 249. Paſch. 1734. Robinſon v. Pett.

10. A. owes money by ſeveral judgments and bonds, and dies inteſtate. His *adminiſtrator pays the judgments and ſome of the bonds*, and pays *more than the perſonal eſtate comes to*. What the adminiſtrator paid on the judgments muſt be allowed him, but as to what he paid on the bonds, he muſt come in pro rata with the other bond creditors, out of the real aſſets. 3 Wms.'s Rep. 400. Mich. 1735. Robinſon v. Tonge and Dunn.

## (D. c) Allowances to be made by Executors. What. And in what Caſes.

1. EXecutor *calls in* and receives a *debt well ſecured*. He ſhall not *pay intereſt*, though he lends it out on profit, but he ſhall make good the principal. 2 Chan. Caſes, 21. Hill. 31 & 32 Car. 2. Groſvenor v. Cartwright. 2 Chan. Caſes, 35. Trin. 32 Car. 2. Linch v. Cappy, S. P.

decreed on much debate that he ſhould not anſwer the intereſt received by him.——But Ld. Keeper North decreed e contra. 2 Chan. Caſes, 152. Mich. 35 Car. 2. Ratcliff v. Greaves.—Vern. 196. pl. 193. S. C. decreed that he ſhould anſwer the intereſt received, though it was urged that the conſtant practice of the Court had been otherwiſe for 20 years paſt and more, and that there were above 40 precedents in the caſe; and the caſes of HASLEWOOD v. BALDWIN, and GARDENER v. CARTWRIGHT were cited, in which laſt caſe it was fully in proof that the executor had received intereſt, and therefore it was decreed that he ſhould account for ſuch intereſt as he had received; but this decree was afterwards reverſed upon an appeal to the Houſe of Lords. But notwithſtanding theſe precedents it was decreed prout ſupra.

Executor or truſtee ſhall account for what intereſt he makes, though he is not impowered or directed to place out at intereſt. Per Ld. K. 2 Vern. 548. pl. 498. Paſch. 1706. Lee v. Lee.

If an executor or truſtee being a perſon of ſubſtance, and places it out in the funds or other ſecurity, and gains conſiderably, he ſhall keep the whole profit becauſe of the hazard he run; but otherwiſe of an inſolvent executor or truſtee becauſe he runs a hazard. Per Ld. Chancellor. Ch. Prec. 505. Mich. 1718. Bromfield v. Witherley.

2. If a truſtee or executor *compounds debts or mortgages, and buys them in for leſs than is due* upon them, he ſhall not take the benefit of it himſelf, but *other creditors and legatees ſhall have the advantage of it, and for want of them the benefit ſhall go to the party who is intitled to the ſurplus*; but if one acts for himſelf, and being not in the circumſtances of a truſtee or executor, buys in a mortgage for leſs than is due, or for leſs than it is worth, he ſhall be allowed all that is due upon a mortgage, for he ſtands in the place of him [434] that aſſigned, viz. the mortgagee, who might have given it to him gratis; and what is due, muſt be the meaſure of our allowance, and not what he gave, for that might have been more than it is worth as well as leſs, and ſince he runs the hazard, if loſs happens, he ought to have the benefit, in caſe it turns to advantage; ſo ſaid, and admitted per Cowper Ld. Chancellor. 1 Salk. 155. pl. 4. Mich. 6 Ann. in Canc. Anon.

3. Where an executor *puts out money without the indemnity of a decree upon a real ſecurity*, and ſuch as there was no ground to ſuſpect at the time, Ld. Harcourt declared it as his opinion, (though he ſaid it was not ſettled,) that the executor under ſuch circumſtances was not liable for the loſs, and ſo ſhould *account for the intereſt*. Wms.'s Rep. 141. pl. 37. Paſch. 1711. in the caſe of Brown v. Litton.

## (E. c) Where Executors or Adminiſtrators are included, though not named.

1. WHERE a man *binds himſelf, without mentioning his executor*, yet the executor ſhall render the debt. Br. Obligation, pl. 15. cites 45 E. 3. 17.

2. *Covenant* lies againſt executors without warranty or words of executors. Br. Covenant, pl. 28. cites 32 H. 6. 32.

3. One makes a *leaſe for a year*, and ſo *from year to year*, *rendering* therefore, *ſo long as the leſſee ſhould occupy it*, 10s. rent. Leſſee after the firſt year dies. His adminiſtrator enters, and occupies it another year; and adjudged, that he ſhall be charged for the rent, though the words were, ſo long as leſſee ſhould occupy; Arg. Lat. 255. cites 5 E. 4. 4.

4. *Covenant to make leaſe* to teſtator at the end of the term, teſtator dies within the term, yet it ſhall be made to the executor; Arg. Palm. 514. cites 24 H. 8. Pet. Br. fo. 50.

5. *Perſonal conditions* will never extend to executors, unleſs expreſsly named; Arg. Carth. 210. cites Br. Statute Merchant, 43. 27 H. 8. 16. D. 65. 9 Rep. 52. Cro. E. 398. Noy, 5. 1 Roll. Rep. 68.

6. There is a difference between an *obligation*, in which there is no word of executor, (becauſe it is a *duty*,) and a *covenant*, which is *executory*, and founds only to damage and wrong, which (as it ſeems) dies with the perſon, &c. Per Baldwin J. D. 14. a. pl. 69. Trin. 28 H. 8. Anon.

7. A. made a *leaſe, reſerving his dwelling*. If he dies, his executor ſhall not have it; but had it had the words (during the term) it had been otherwiſe; Arg. Lat. 256. 265. cites it as ſaid per Audley, 29 H. 8. 19.

8. A. *leaſed to B. for 40 years*, and *covenanted that B. ſhould take* convenient *fireboot, &c. in a wood, not parcel of the land leaſed from time to time*, but no time mentioned in certain. The executors of B. ſhall take it as aſſignees. Mo. 6. pl. 23. Paſch. 3 E. 6. Anon.

9. A man covenants *to pay all quit-rents*; if he does not pay them, and dies, it ſeemed to ſeveral juſtices, that the executor is not obliged to pay them; for that it is only a perſonal covenant. But the reporter ſays, tamen quære. D. 114. a. pl. 60. Paſch. 2 & 3 P. & M. Ingery v. Hyde.

10. A

10. A *cuſtom* is to be taken ſtrictly, and therefore a cuſtom to bind a man ſhall not extend to his executors. Le. 2. pl. 3. Hill. 25 Eliz. B. R. Wade v. Bembo.

11. Executors are included in the *ſtatute of* 23 *H.* 8. 3. *of attaint againſt juries*, though not mentioned, and ſo in *ſtatute* 21 *H.* 8. *of reſtitution*. And. 25. pl. 53. Paſch. 3 Eliz. Auſten v. Baker. 6 Rep. 80. So in the ſtatute 3 *Jac.* 8. *of executions*, not to be ſtayed on writs of error, &c. Sid. 363. Litt. Rep. 2. Cro. E. 350.

12. It was *ordered that* the *defendant ſhould pay money unto one M. who died before payment*, yet he ſhall pay it to his executors according to the former order. Toth. 235. cites 11 & 12 Eliz. Maſcall v. Shelly.

13. A. was bound to ſtand to the award of two *arbitrators*, who *award payment to a ſtranger or his aſſigns before ſuch a day*. The *ſtranger dies before ſuch a day*, and B. takes letters of adminiſtration. It was the opinion of the whole Court, that *the money ſhould be paid to the adminiſtrator, for he is aſſignee;* and by Gawdy J. if the word aſſignee had been omitted, yet the payment ought to be made to the adminiſtrator, quod Coke affirmavit. Le. 316. pl. 445. Paſch. 30 Eliz. B. R. Anon, 3 Le. 212. pl. 278. S. C. in totidem verbis.—— Cro. E. 10. pl. 6. Mich. 24 & 25 Eliz. C. B. Kinguel v. Knapton, S. P. held accordingly.

14. Executors not named are capable of *diſcharge* or *benefit perſonal*. See 6 Rep. 80. a. Trin. 5 Jac. C. B. Phitton's caſe. Palm. 514. Arg. S. P. and cites S. C.

15. Bond on *condition to pay* 10l. *to one whom the obligee ſhould name by his laſt will*. The executor ſhall not take, if no one is named to take expreſsly. Godb. 192. pl. 274. Trin. 10 Jac. C. B. Meade's caſe. Mo. 855. pl. 1172. Peaſe v. Meade, S. C. adjudged, and that obligation was diſcharged for want of naming an aſſignee.—— Brownl. 77. S. C.—— Hob. 9. pl. 29. Peaſe v. Mead, S. C. held accordingly.

16. Bond to pay 10l. *to the obligee or his aſſigns;* the executor ſhall have it, becauſe it was a duty in the obligee himſelf. But if it was to pay *to the aſſignee of the obligee*, and his aſſignee makes an executor, and dies, the executor ſhall not have the 10l. Per Coke Ch. J. Godb. 192. pl. 274. Trin. 10 Jac. C. B. in Mead's caſe.

17. A. is *bound to build a houſe* for B. before ſuch a time. A. dies before the time; his executors are bound to perform it; per Coke Ch. J. 3 Bulſt. 30. Paſch. 13 Jac. S. P. and ſays that there is a diverſity between an aſſumpſit to pay debts and when it is to do a collateral act; for in ſuch caſe if it be broken in teſtator's life-time ſo that it cannot be performed by the executor, and damages only are to be recovered, there *moritur cum perſona* if the executor be not named in the promiſe; and ſo of a covenant if broken in teſtator's life-time, he ſhall not be charged if not named. Roll. Rep. 266. pl. 19. Mich. 13 Jac. B. R. in caſe of Saunders v. Eſterby.

So of a covenant to repair within ſix years; but if it had been to repair during his life, it had been otherwiſe. Arg. 4 Le. 171.

18. Executor doth ſo repreſent the perſon of his teſtator, and is ſo included in him, as that every *bond or covenant*, made by teſ-

tator *for payment of money*, &c. extends to the executor, though not named, though otherwiſe it is of the heir. Went. Off. Ex. 117.

* 19. A. was *bound to pay B. 10l. within a month after requeſt to him*, and he *died before requeſt*. It is not ſufficient to make requeſt to the executor. Went. Off. Ex. 101. cites it as ſo ſaid per Manwood.

20. So where the *ſtatute of W.* 1. gives time for proof to him whoſe goods were wreſted, [wrecked,] his executors may do it, if he die before the time Went. Off. Ex. 100. Marg. cites 5 Rep. 107. b. and 6 Rep. 60.

21. Though in *penal matters* the executor is not all one with the teſtator, yet, in points *beneficial* to the teſtator, includes him in ſome caſes; *as* where an abbot granted to his *leſſee to take eſtovers in alieno ſolo*, it was held that his executor, though not named, ſhould enjoy during the term, as well as himſelf ſhould have done. Went. Off. Ex. 102, 103.

22. *So* where ſtatute 23 *H.* 8. *gives coſts to a defendant* againſt a plaintiff ſuing for a wrong or breach of promiſe, &c. done to the plaintiff, againſt whom it paſſeth by verdict or nonſuit; it has been reſolved that executor in ſuch caſe, ſuing for a wrong, &c. to his teſtator, ſhould not pay coſts, becauſe he is another perſon than the teſtator, and this is the common experience. Went. Off. Ex. 103.

Sav. 2. pl. 5. Paſch. 22 Eliz. in Warren's caſe, S. P.

23. Condition to pay 10 l. to obligee at a day, *includes* his executor. Agreed, Arg. Hill. 3 Car. Palm. 515. —— Co. Litt. 209. b. 210. a. S. P.

24. A. *deviſed* 20*l. to B. within four years*, within which time J. S. dies; yet the executor ſhall have it. Palm. 514. Arg.

25. *Mortgage money* limited to pay to mortgagee before Michaelmas, before which mortgagee dies, yet the money ſhall be paid to his executor; Arg. Palm. 514. Hill. 3 Car. B. R. in caſe of Wood v. Bates.

Litt. Rep. 156. Manington's caſe, S. C. the Court ſeemed to be of the ſame opinion, ſed adjornatur.

26. Where a condition is to be performed, the Court ſeemed to be of opinion that adminiſtrator is included, and that it ſhall be performed to adminiſtrator. Het. 115. Trin. 4 Car. C. B. Maningham's caſe.

27. Grant of a *next preſentation to J. S. during the life of J. S.* does not carry the preſentation to the executors of J. S. if he dies before the church becomes void. Cro. C. 506. pl. 8. 14 Car. B. R. Mann v. Hyde.

Jo. 407. pl. 6. Hyde v. Man, S. C. the Court held that it was a limited grant, ſo that if no avoidance

28. In a *quare impedit*, the defendant *pleaded, that the patron granted the next preſentation to B. who died, and made his executor, who preſented the defendant*; iſſue was taken upon non conceſſit, and the *jury found that the patron granted the next preſentation to B. during his life, and that he died before the church became void*; adjudged, that this was not an abſolute grant of the next avoidance, but is limited unto him to preſent to the advowſon, if it becomes

void

void during his life, and not that otherwiſe it ſhould go to his executors. Cro. Car. 505, 506. pl. 8. Trin. 14 Car. B. R. Mann v. Biſhop of Briſtol and Hide.

happened during his life his executors ſhould not have it.

29. *Limitation of the truſt of a term to A.* is good to A.'s executor. Chan. Caſes 8. Hill. 13 & 14 Car. 2. Goring v. Bickerſtaff.

30. A. conveyed lands to B. and his heirs, and *covenanted with B. his heirs, and aſſigns, for quiet enjoyment;* B. was diſturbed in his life-time, and made J. S. his executor, and died. Agreed by all the juſtices, that though the covenant was only with B. his heirs, and aſſigns, and that the eſtate was an eſtate of inheritance, yet the * breach being in the teſtator's life-time, the executors may well bring action of the *damages.* Vent. 176. Mich. 23 Car. 2. B. R. Lucy v. Levington.

2 Lev. 26. S. C. reſolved that the damages ſhall be recovered by the executors though not named in the covenant, becauſe they repreſent the perſon of the teſtator.

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31. Teſtator for himſelf and his executors *covenanted to pay* B. ſo much as his proportion ſhould amount to, *ſo as B. gave him notice in writing*, and dies. It was held, that becauſe the covenant runs in intereſt and charge, and ſo the executor is bound to pay, notice muſt be given to him. 2 Mod. 268. Mich. 29 Car. 2. C. B. Harwood and Binks v. Hilliard.

32. *Intereſt in an ideot* granted to A. by the king, *quamdiu* the ideot ſhall continue ſo, it will go to the executors of the grantee. Arg. Vern. R. 10. Mich. 1681. in caſe of Prodgers v. Frazier.

33. If on a ſubmiſſion to arbitrators by A. and B. they *award* 20*l. to A. and that A. ſhall releaſe all demands, &c.* to B. and then *A. dies* before the releaſe made or the money paid, adjudged that A.'s executor, not named, ſhall have the 20 l. (for by the award a duty is created) and ought to releaſe all demands which A. had againſt B. 2 Vent. 249. Mich. 2 W. & M. in C. B. Dawney v. Veſey.

34. A. is *bound* to B. that he will *not ſue J. S.* A.'s executor may ſue J. S. and it ſhall not be any forfeiture of the bond; for this condition is a *collateral* thing, and ſhall be conſtrued according to the words, which extend to the perſon only, and not to the heir or executor. Arg. Show. 331, 332. Mich. 3 W. & M. in caſe of Carivil v. Edwards, cites 27 H. 8. 16. where it was agreed by Fitzherbert, and denied by none in the Prior of St. John of Jeruſalem's caſe.

Executor repreſents the perſon of the teſtator as to obligations and liens, but not in conditions. In collateral clauſes the executor is bound. Arg. Show. 332. Mich. 3 W. & M.

35. Condition to *make A. a leaſe* for life by ſuch a day, *or pay him* 100*l.* A. died before the day. Treby Ch. J. ſaid it was adjudged that A.'s executor ſhould have the 100l. 1 Salk. 170. pl. 2. Mich. 9 W. 3. C. B. Anon.

## (F. c) Where the Word Executors includes Adminiſtrators.

1. *A Rent upon condition to* the executors goes to the adminiſtrators. Arg. Hetl. 115. cites 46 E. 3. 18.

2. If a man *limits a thing to be done to* his executors, it may be done to his adminiſtrators. Arg. Hetl. 115. cites 5 H. 7. 12. 26 H. 8. 7.

3. *A. delivered* 20 *l. to B. ad emendum*, &c. and *B. gives a receipt* for ſo much money, but it *has no word of promiſe of payment* of the ſaid ſum. B. dies inteſtate. A. may have debt upon this deed againſt the adminiſtrator of B. Adjudged and affirmed in error. Jenk. 195. pl. 2. cites D. 20.

4. Adminiſtrators ſhall not take a *thing limited in purchaſe to an executor*, as he ſhall not enter for condition broken, nor have rent nor benefit of an exception appointed to the executor. Mo. 666. pl. 911. Mich. 44 & 45 Eliz. Sparke v. Sparke.

[438] By the 31 E. 3. adminiſtrator and executor is all one. Arg. Litt. Rep. 175. in caſe of Parſon v. Evarr.

5. *Bond to pay to his executors*; if there is no executor it ſhall be paid to the adminiſtrator. Litt. Rep. 158. Trin. 4 Car. Mannington's caſe.

For more of Executors in general, ſee Deviſe, Extinguiſhment, Inventory, and other proper Titles.

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# Explees.

## (A) Alleged. In what Caſes or Actions they muſt be.

1. IN *formedon* the explees ought to be alleged, for otherwiſe the count is not good, and *yet when they are alleged they are not traverſable.* Per Martin. Br. Explees, pl. 6. cites 9 H. 6. 61.

And yet contra it is in aſſiſe. Ibid. cites 19 H. 6. 59.

2. In writ of *entry in nature of aſſiſe* the demandant ought to allege explees *in his count*; for this action is a præcipe quod reddat. Br. Explees, pl. 7. cites 21 H. 6. 18.

3. In *ceſſavit*, nor in *writ of eſcheat*, the demandant ſhall not allege explees; the reaſon ſeems to be, inaſmuch as *they claim by his*

*his ſeigniory*, and *not by any ſeiſin in their anceſtor in the land*; where there is no ſeiſin in him, nor in his anceſtor in the land, there he cannot allege explees of the profits of the land, for he has only the ſeigniory. Br. Explees, pl. 5. cites 21 H. 6. 22.

4. The *profits of a mine* are not explees for the land but only for the mine itſelf. Vaugh. 255. Mich. 20 Car. 2. C. B. in the caſe of North v. Coe.

5. The ſame of *woods* which may be a divided inheritance from the ſoil. Ibid.

6. When a *fee-ſimple is demanded*, there explees ought to be alleged in the donor and alſo in the donee; but when an *eſtate tail* only is demanded, there it is ſufficient to allege explees in the donee only. 2 Lutw. 973. Hill. 3 W. & M. by Lutwich in his argument intended in caſe of HUNLOCK v. PETRE, cites 8 E. 3. 19. pl. 3. 27 E. 3. 84. 9 H. 6. 53. and F. N. B. 220. (C) and (D) is expreſs, that in formedon in reverter explees in the donor and donee ought to be alleged in the count, and cites Fitzh. tit. Formedon, 31. as to a remainder in fee, and there it was ruled, that a count for this defect was ill; but it was amended. And in 50 E. 3. pl. 3. the difference between a demand of a fee-tail and of a fee-ſimple is taken and reſolved by the Court, and with thoſe authorities the following precedents agree, viz. Raſt. tit. Formedon in Reverter, three precedents. Co. Entries, 340. and 341. [439] and 342. Hearne, 503. and 519. Aſhton, 405. and 406. two precedents. Old Entries, 91. and 199. b. but the right folio is 200.

## (B) Alleged. How. And in whom.

1. EXPLEES were alleged *in medietat' gurgitis unde petens ſeiſitus in dominico ſuo ut de feodo*, and did *not ſay, ut de feodo & jure*, and well; quod nota. Br. Explees, pl. 9. cites 13 E. 3.

2. The demandants in *quod ei deforceat* alleged explees *in their anceſtor's donees in tail, and in themſelves alſo*, and awarded good; for it is only *ſurpluſage*. Br. Explees, pl. 2. cites 46 E. 3. 21. S. P. Ibid. pl. 8. cites S. C.

3. *Formedon in remainder;* the demandant need *not* allege explees *in the donor;* per Cur. *but in the tenant for life*, to prove the gift executed. Br. Explees, pl. 1. cites 9 H. 6. 53, 54. It ſuffices to allege explees in the tenant for life, and in the donee in tail, becauſe he demands fee-tail. Ibid. pl. 3. cites 50 E. 3. 1, 2.

4. *But* in formedon *in the reverter*, he ſhall allege explees *in the donor and in the donee*. Ibid. S. P. per Cur. Ibid. pl. 3. cites 50 E. 3. 1, 2.——S. P. Ibid. pl. 10. cites 11 E. 3.

5. *And* per Martin, in formedon *in deſcender upon a leaſe for life, the remainder to his anceſtor in tail*, he *need not* make *mention* of the *tenant for life*. Ibid. In formedon in deſcender by the heir of him in remainder by the death of the firſt donee without iſſue, where the remainder is over in tail, explees ſhall be alleged in the firſt donee, and in him in remainder father of the demandant who brought the formedon, and otherwiſe ill. Br. Explees, pl. 10. cites 11 E. 3. and Fitzh. Formedon, 31. ——Fitzh. Formedon,

Formedon, pl. 31. S. P. cites Trin. 11 E. 3. [but there is no ſuch year in the Year-book.] —— And in formedon in reverter explees ſhall be alleged in the donor and the donee; but in formedon in deſcender the explees ſhall be alleged in the donee only. Ibid.

For more of Explees in general, ſee other proper titles.

# Extinguiſhment.

## (A) What ſhall be extinguiſhed by Conjunction of Eſtates.

*[440] The execution by elegit of the lands extended was upon a recovery of damages by the conuſor againſt the conuſee,

[1. IF the *conuſee of a ſtatute has the land* of the conuſor *in extent, and* after it is extended upon an elegit ſued againſt the * conuſee, and the *tenant by elegit grants his eſtate to the firſt conuſor*, who is tenant of the franktenement; this ſhall not extinguiſh the extent upon the elegit (for there it is in nature of a reverſion in the conuſee, for it is to be intended that it is not extended for all the years for which the conuſee has his extent). 31 Aſſ. 6.]

and held well, and that the conuſee ſhall never have aſſiſe againſt the conuſor for the execution upon the ſtatute. Br. Extinguiſhment, pl. 61. cites S. C. —— Br. Aſſiſe, pl. 319. cites S. C. —— Br. Execution, pl. 84. cites S. C. [but I do not obſerve that either of thoſe citations expreſſes the grant over to the conuſor by a third perſon].

[2. If a *copyholder* of a manor has had, time out of mind, &c. *a way over the land of another copyholder*, and he *purchaſes the inheritance of his copyhold*, by which the copyhold is extinct, yet the way is not extinct by it. Paſch. 40 Eliz. B. R. between EMSON AND WILLIAMSON.]

Co. Litt. 182. b. S. P. and in Marg. cites S. C. —— S. C. cited 2 Lutw. 1173.

[3. If *tenant for life and a ſtranger purchaſe the reverſion*, this extinguiſhes the eſtate for life for one moiety, and ſevers the jointure. 2 Rep. 61. WISCOT'S CASE. 39 H. 6. 2. b.]

† Fol. 934. Co. Litt. 882. b. S. P. and in Marg. cites S. C. —— Cro. E. 470. (bis) pl. 28. Child v. Weſcot, S. C. adjornatur. —— Ibid. 481. pl. 15. S. C. reſolved. —— Lutw. 1173. cites Co. Litt. 182. b. S. P.

[4. *So* if *one joint-tenant for life purchaſes the reverſion in fee*, this † extinguiſhes the eſtate for life for a moiety, and ſevers the jointure. 2 Rep. 60. b. WISCOT'S CASE reſolved. Contra D. 28 H. 8. 12. b. 7 H. 6. 2. b. 3.]

[5. *So* in the ſaid caſe, *if the fee deſcends to one* of the leſſees for life; this extinguiſhes the one moiety, and ſevers the jointure. 2 Rep. 60. b. WISCOT'S CASE reſolved.]

[6. If a *rent be granted to a tenant of the land and a ſtranger in fee*, this is extinct for a moiety, becauſe he has as high eſtate in the one as in the other, and ſo the jointure ſevered. Pl. C. 419. BRACEBRIDGE'S CASE.]

[7. If *leſſee for life grants his eſtate to leſſor and a ſtranger*, this is extinct for a moiety, and the jointure ſevered. 2 Rep. 61. WISCOT'S CASE.]

[8. If the *tenant infeoffs the lord and a ſtranger*, it ſeems that this is not extinct in any, for theſe are *diſtinct things*. * 11 H. 7. 13. dubitatur. 7 H. 6. 3.]

* Br. Extinguiſhment, pl. 58. cites S. C. thus, viz.

Per Huſſey Ch. J. if lord and tenant are, and the tenant enfeoffs the lord and another, who makes a feoffment over, the ſeigniory is not revived for the moiety; for if the other dies, the ſecond feoffee may vouch the lord for the whole, ſuppoſing that he enfeoffed him of the whole; and if they were diſſeiſed and the other dies, the lord ſhall have aſſiſe of the whole, ſuppoſing that he was diſſeiſed of the whole. Davers contra; for nothing paſſes but the moiety, and the one can neither give nor forfeit but the moiety, and by partition had between them, the ſeigniory is revived for the one moiety.

If the lord and A. B purchaſe the tenancy in fee, and A. B. ſurvives, the heir of the lord ſhall have the moiety of the ſeigniory; for the father ſhall not have as durable an eſtate in the one as he had in the other. Wich. contra; for all is extinct there, by reaſon that the father once had as high an eſtate in the land per my & per tout as he had in the ſeigniory. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

[9. If *leſſee for years as executor purchaſes the reverſion*, this extinguiſhes the leaſe for years, though he has in auter droit; but it ſhall be aſſets. Extinguiſhment Brook, 54.]

Br. Extinguiſhment, pl. 57. cites 43 E. 3. 27. Contra, that the leaſe is not extinct, eſpecially as to be aſſets in his hands as executor, and if it ſhould be † extinct it ſeems to be a devaſtavit ad ultimum. —— Br. Executor, pl. 174. cites S. C. accordingly, but that it ſhall be extinct as to the executor of the purchaſor to have it as a term. ——Br. Leaſes, pl. 63. cites 4 E. 6. S. P. that it ſhall be aſſets though the leaſe is extinct; but that where they have a leaſe as executors, and there is another leaſe in reverſion for years, and they purchaſe the reverſion in fee, the firſt leaſe remains by reaſon of the meſne rent.

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[10. If *leſſee for years, the reverſion for life to A. a feme covert* are, and the *leſſee grants his eſtate to the baron*, and after the *feme dies*, this term is not extinct, becauſe the baron had the eſtates in *ſeveral rights*; for the frank-tenement was in the wife, and the baron only ſeized in her right. Mich. 22 Jac. B. R. adjudged upon a ſpecial verdict between LINSDEN AND WINDSMORE.]

2 Roll. Rep. 472. S. C. Lichden v. Winſmore and Tucker. S. C. adjornatur.—— Cro. J. pl. 4. Paſch. 9 Jac. B. R. Platt v. Sleap, where the baron having a term in his own right and the inheritance deſcended to the wife (ſo as he had a freehold in her right) three juſtices, contra Williams, held that the term was not drowned, but that the huſband might well aſſign it over. ——Bulſt. 118. S. C. adjudged accordingly. ——But Ibid. Crooke J. ſaid, if the huſband after this deſcent had had iſſue by his wife, ſo as thereby he was intitled to be tenant by the curteſy, and ſo to have it in his own right, it would have much enforced the caſe; but there being no iſſue, no opinion was given as to this point.

[11. If a *feme leſſee for years takes the leſſor to baron*, yet this does not extinguiſh the term. Pl. C. Curia. 418. b. BRACEBRIDGE'S CASE.]

S. C. cited 2 Roll. Rep. 472.—— S. C. cited per Curiam, Cro. J. 275. —— Co. Litt. 338. b. S. P. The term is not drowned, but he is poſſeſſed of the term in her right during the coverture.

[12. *So* if *leſſee for years grants his term to the feme of leſſor*, yet this does not extinguiſh the term. Curia, Pl. C. 418. b.]

13. *He who has a ſtatute merchant delivered to him as bailee, upon condition*, &c. and *makes the conuſee his executor, and dies*, the conuſee

nuſee may have the livery upon condition againſt him as executor, and e contra againſt him as party. Br. Extinguiſhment, pl. 57. cites 43 E. 3. 27, 28.

14. If *tenant by ſtatute merchant*, &c. *brings aſſiſe, and pending the writ, the fee ſimple deſcends to him*, this ſhall abate the writ; for the deſcending of the greater eſtate extinguiſhes the leſſer. Br. Extinguiſhment, pl. 56. cites 32 H. 6. 30.

15. If a man has a *warren by preſcription, and afterwards purchaſes the land to him and to another*; yet the warren remains, and is not extinct as a rent or common ſhould be; note the diverſity. Br. Warren, pl. 3. cites 35 H. 6. 55.

16. If there be lord *meſne and tenant*, and the lord *paramount purchaſes the tenancy in fee*, the ſervice of the meſnalty is extinct. Litt. ſ. 231.

17. Note, by the juſtices, that if *lord and tenant* are, and the *tenant enfeoffs the lord and J. N.* of the tenements, *and makes livery to J. N. not knowing of the ſeigniory*, yet the *lord may diſtrain for the ſervices, if he does not occupy the land, nor agree to the feoffment*; and it ſeems that avowry in court of record is a diſclaimer and waiver of the tenancy in this caſe. Br. Extinguiſhment, pl. 33. cites 10 E. 4. 12.

18. A man *has a leaſe for years, and after takes* intereſt *for term of life, to take effect immediately*; there the leaſe for years is extinct. Br. Extinguiſhment, pl. 50. cites 11 H. 4. 34.

19. *But* where one *leaſes* to J. N. *for term of life and* 20 *years over*, there he ſhall have both; for in the one caſe both are in him ſimul & ſemel. Ibid.

20. Note, that *franktenement cannot* be ſuſpended, *but ſhall be adjudged in the king without office, in caſe of eſcheat or reverſion after tail determined, or if remainder be tailed to the king, and the tenant for life dies*; for franktenement cannot be ſuſpended. Br. Extinguiſhment, pl. 53. cites 9 H. 7. 2.

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Dal. 52. pl. 25. S. C. in totidem verbis.

21. If *feme executrix has a term*, and *ſhe takes baron*, and the *baron purchaſes the reverſion*, the term is extinct as to the feme, if *ſhe ſurvives*, but in reſpect of all ſtrangers, ſhe ſhall account as aſſets in her hands. Mo. 54. pl. 157. Paſch. 5 Eliz. Anon.

22. *Leſſee for years aſſigned the term to the wife of the leſſor and a ſtranger*, and afterwards the *leſſor bargained, and ſold the land* for money *by deed enrolled, and died*, and the *ſtranger died*, and the *wife claimed to have the reſidue of the term not expired*. The queſtion was, whether, by the bargain and ſale, the term of the wife was extinguiſhed? and a diverſity was taken between that and a feoffment in fee with livery; for by the livery he gives all his intereſt in the land and poſſeſſion thereof, and all that may be adjudged in him ſhall paſs by the livery, and ſo the term ſhall paſs alſo by union and extinguiſhment, but by bargain and ſale nothing will paſs but the uſe, and cited Plowd. Com. Townſend's caſe. But in the principal caſe no judgment was given. Mo. 171. pl. 304. Mich. 25 & 26 Eliz. Anon.

2 And. 192. pl. 9. S. C. that the

23. The *huſband, being ſeiſed in fee, made a leaſe to one O. and S.* but it was *in ſecret confidence for the preferment of his wife*; and *afterwards*

*terwards he made a feoffment to the ſaid O. and others of the ſame lands to other uſes.* Decreed, by advice of Wray, Anderſon, and Manwood, that the term was not extinguiſhed, becauſe of *the proviſo in the ſtatute* 27 *H.* 8. *of uſes, which ſaves all intereſts which the feoffees to the uſe of others have, or ſhall have, in the lands to their own proper uſe;* and here it doth not appear but that O. had this leaſe for his own uſe, therefore it is not extinguiſhed by the feoffment which he took to the uſe of another. Mo. 196. pl. 345. Trin. 27 Eliz. Cheney's caſe.

leaſe was made to O. for years with rent reſerved, and divers covenants on the part of O. though the leaſe in truth was in truſt to the uſe of the wife and the education of their ſons and daughters, and afterwards C. enfeoffed the ſaid O. to the uſe of himſelf and his ſaid wife, for term of their lives with remainder over. The two Chief Juſtices and Ch. Baron held, that becauſe the ſaid O. had the ſaid leaſe to his own proper uſe and not to any other, the leaſe is not determined by the feoffment, and that the intention of the ſaid C. did not tend any how to that purpoſe; for it is not an uſe but a truſt, to which the makers of the ſtatute had no regard, &c.

24. *Two were ſeiſed of two ſeveral acres of land, of which the one ought to incloſe againſt the other; one purchaſes them both, and lets them to ſeveral men.* Adjudged, that the incloſure is not revived, but remains extinguiſhed. Poph. 167, 168. Arg. cites Hill. 36 Eliz. Rot. 1332. Hemden v. Crouch.

25. A *leaſe* was made *to baron and feme for years, who entered.* The *leſſor afterwards enfeoffed the baron, who died ſeiſed.* The feme ſurvived, and claimed the term. The whole Court held, that by the acceptance of the feoffment, the baron had ſurrendered the term, and it is extinguiſhed. But if it had been by bargain and ſale inrolled, or by fine, it had been otherwiſe; and judgment for the plaintiff. Cro. E. 912. pl. 24. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

26. *One had a way from one acre to another,* and *afterwards purchaſed the acre upon which he had the way, and after* that *ſold it;* the opinion of three juſtices was, that the way was extinguiſhed. Poph. 168. Arg. cites Hill. 4 Jac. Jordan v. Ayloff.

27. If *one ſeiſed of a manor makes a leaſe for years of parcel* of the ſame, and *afterwards makes another* leaſe *of the ſame lands to another, to commence after the determination, ſurrender or forfeiture of the firſt leaſe.* If the *leſſor enfeoffs the firſt leſſee of the manor,* that is a determination of the firſt leaſe, and the ſecond leſſee may enter. Hetl. 55. Mich. 3 Car. C. B. Per Crook, in Northern's caſe.

28. Where a *charge upon land comes to the ſame perſon that is intitled to the land,* if he has not the *ſame intereſt in both,* there ſhall be no extinguiſhment upon this account. Barnard. Chan. Rep. 117. Paſch. 1740. Price v. Seys. [ 443 ]

## (A. 2.) Extinguiſhment of Charge. By Purchaſe of Part of the Land charged.

1. LAND of J. S. was delivered in *execution on a ſtatute merchant to A. and B.* and afterwards *C. ſued an elegit* for damages recovered in treſpaſs againſt J. S. and had execution of a moiety as

as of the land of J. S. but *before the executing the elegit J. S. enfeoffed A. one of the conuſees in fee;* it ſeems by this purchaſe, by one of the conuſees only, the intire eſtate is determined and extinct. Br. Aſſiſe, pl. 231. cites 21 Aſſ. 23.

If the inheritance of the land extended comes to the conuſee it deſtroys the whole extent.

2. If *conuſee purchaſes parcel* of the land, yet this does not diſcharge the *reſidue in the hands of the conuſor;* for his body and goods are always chargeable. 2 Roll. Statutes, (M.) pl. 10. cites 45 E. 3. 22. b. 25 Aſſ. 7. 25 E. 3. 51. Com. Pope v. Roſſe, 72. b. 23 E. 3. Execution, 127. Contra 22 E. 3. 16.

For if it ſhould not the conuſee would hold the reſidue of the land longer, becauſe the profits that ſhould ſatisfy the debt muſt be leſs, and this would be to the wrong of him in reverſion. Per Ventris J. 2 Vent. 327. in caſe of Dighton v. Greenvill.

Br. Releaſe, pl. 85. cites S. C. and Fitzh. Aſſ. 318.

3. If the grantee *purchaſes parcel* of the land, *all ſuch things as are againſt common right* are extinct, becauſe in aſſiſe for them all tertenants ought to be named, and inaſmuch as the grantee hath parcel of the land by his own act, all the rent ſhall be extinct. Co. Read. on Fines, 7. cites 34 Aſſ. 15.

Br. Releaſe, pl. 85. cites S. C. and Fitzh. Aſſ. 318.

4. *So* if a man hath a *rent-charge out of* 20 *acres*, if he *releaſes all his right in one acre*, this extinguiſhes the grant in all. Co. Read. on Fines, 7. cites 34 Aſſ. p. 15.

5. If *conuſee purchaſe parcel* of the land, and after *conuſor aliens the reſidue* of his land *to J. S. a ſtranger*, J. S. ſhall hold his land purchaſed diſcharged; becauſe he ought to have contribution againſt the conuſee, and he cannot contribute to himſelf, and therefore by his purchaſe all the land, which ſhall come to the hands of feoffees, is diſcharged. 2 Roll. Abr. Statutes, (M.) pl. 8. cites Pl. C. 72. b. Pope v. Roſſe, D. 2 & 3 Eliz. 193. pl. 30. Adjudged. 35 H. 6. Execution, 21. per Cur.

## (B.) By Act in Law.

*[444] Cro. C. 372. S. C. adjudged.—Jo. 345. S. C. adjudged.—S. C. cited Hutt. 128. as adjudged.—S. C. cited by Holt Ch. J. 1 Salk. 305. and ſaid, that having no aſſets of the obligor he is not the perſon who ought to pay; but if the executor of the obligee is made executor to one of the obligors and has aſſets of the obligor the debt is extinct, and the executor cannot ſue the other obligor; for the having aſſets amounts to payment; and ſaid, that the S. P. was again reſolved Hill. 24 Car. 2. B. R. in caſe of † Lock v. Crosse, where the

[1. IF *A. and B.* are *bound in an obligation jointly and ſeverally to C.* and after *B. makes D. his executor*, and dies, and D. takes upon him the execution of the will, and fully adminiſters all the goods of A. and after *the obligee makes the ſame D. his executor*, and dies, whether this extinguiſhes the obligation as to B. is * the queſtion. H. 9 Car. B. R. Dorchester against Webb. This was a doubt, and argued upon a demurrer at the bar, and the Court ſeemed to be of divers opinions, and ſaid it was a good queſtion. Intratur. Mich. 9 Car. Rot. 373. But Tr. 10 Car. this was adjudged to be no extinguiſhment, but the plaintiff had judgment to recover againſt B. becauſe that he had this *en auter droit*. In the ſaid caſe another matter was, that *A. made D. and C. his executors, and* that *C. refuſed the adminiſtration, and died* within a month after, *and made* (as before is put) *D. his executor alſo;* and per Cur. the making of C. executor, he refuſing to adminiſter, does not extinguiſh the debt.]

the obligee was made executor to one of the obligors, and in an action by him againſt the other where the matter was pleaded the plea was held to be nought, becauſe he did not ſhew to what value the aſſets were that he adminiſtered; but if the defendant had ſhewn that he adminiſtered goods to the value of the debt in demand, it had been a good plea.

† 2 Lev. 73. Cock v. Croſs, S. C. adjudged. ——— 3 Keb. 116. pl. 24. Croſſe v. Cork, S. C. adjudged for the plaintiff.

[2. If the *obligee dies inteſtate, and adminiſtration* of the goods of the obligee *is committed* by the ordinary *to the obligor*, yet this does not extinguiſh the debt, but the debt remains, notwithſtanding this. Reſolved. 8 Rep. 136. Sir John Needham's case.]

S. C. cited by Holt Ch. J. 1 Salk. 306. and ſays, that the reaſon of the diverſity between an executor

[3. If *obligee makes the obligor his executor*, this is a releaſe and extinguiſhment of the debt. 8 Rep. 136. Sir John Needham's case. Pl. C. 184. Woodward.]

obligor and an adminiſtrator obligor is, becauſe the adminiſtrator is made by act of law, but the executor is made by the act of the teſtator, and for that reaſon it is no extinguiſhment; but if the adminiſtrator having no aſſets pays a debt of the inteſtate to the value of the bond with his own money, that will be a releaſe; though, he ſaid, he did not know that it had been adjudged ſo. ——— A debtor made executor ſhall not extinguiſh his debt, but the ſame ſhall be taken to be part of the teſtator's perſonal eſtate. Chan. Rep. 138. 15 Car. Aſkwith v. Chamberlain. ——— Ibid. Marg. ſays it ſhall be aſſets [to pay other debts] and not extinct. ——— Toth. 115. S. C. and that it ſhall go to the eſtate.

[4. If *feme obligee takes* obligor, *or one of the obligors, to baron*, it is an extinguiſhment of the debt. 8 Rep. 136. Sir John Needham.]

A. makes an obligation to B. to the uſe of C.—A. ſeals it; A., B., and C. being at the time of ſealing it at one place; A. puts the obligation into the hands of C. and ſays this will ſerve; this is good delivery; and though C. afterwards marries A. yet the obligation remains, and is neither extinguiſhed nor ſuſpended. Adjudged and affirmed in error. Jenk. 221. pl. 75.

[5. If *feme executrix of the obligee takes the debtor to baron*, this is not any releaſe in law, becauſe that ſhe has the debt en auter droit, and if this ſhall amount to a releaſe in law, it will amount to a *devaſtavit*, * which is a tort, which the law will not ſuffer. 8 Rep. 136. Sir John Needham's case, cites Mich. 30 & 31 El. B. R. adjudged.]

* Fol. 935.

S. P. adjudged that by the intermarriage the debt was

not extinguiſhed but only ſuſpended, and the action was revived againſt the executors of the huſband. Cro. E. 114. pl. 12. Le. Mich. 31 & 32 Eliz. B. R. Croſsman v. Read. ——— Mo. 256. pl. 368. S. C. adjudged. ——— 320. pl. 448. S. C. accordingly. ——— Co. Litt. 264. b. S. P. and in Marg. cites S. C. ——— S. P. admitted by Holt Ch. J. Ld. Raym. Rep. 520. Hill. 11 W. 3. for if it ſhould be an extinguiſhment it would be a wrong to creditors, and amount to a devaſtavit, which an act in law will not do, and cites S. C. of 8 Rep. 136. a. And things ſhall be extinguiſhed between the parties which yet ſhall remain and have exiſtence as to ſtrangers; as if a tenant for life grants a rent charge and then ſurrenders to the reverſioner, or if a man who has a rent in fee acknowledges a ſtatute and then releaſes to the tertenant; the eſtate for life in the one caſe will continue as to the grantee of the † rent, and the rent in the other caſe as to the conuſee. ——— Where a man is indebted and marries with the executrix, and the executrix dies, this is no devaſtavit; for the huſband has been charged; cited by Coke to have been adjudged. Gouldſb. 181. in pl. 117.

† [ 445 ]

[6. If *A. and B. are bound* in an obligation *jointly and ſeverally to* C. and *C. makes D. the wife of A. his executrix*, and dies, *D. adminiſters*, and after *A. the baron of D. makes D. his executrix*, and dies, leaving *ſufficient aſſets* to pay the debt, and after *D. dies, and E. takes adminiſtration of the goods of C.* the obligee *unadminiſtered*, yet he cannot have any action upon the obligation againſt B. the other obligor, becauſe when the obligor made the executrix of the obligee his executrix, and left aſſets, the *debt was immediately*

Hob. 10. pl. 20. S. C. —Mo. 855. pl. 1174. S. C. adjudged. —Brownl. 76. S. C. adjudged. —S. C. cited per Curiam as adjudged.

Jo. 345. pl. 3.

*ately ſatisfied by way of retainer*, and then by conſequence no new action may be had for this debt. Hob. Rep. between FRYER AND GILDRIDGE, 14. adjudged. Intratur Hill. 11 Jac. B. Rot. 1990.]

Hob. 216. pl. 280. S. C. adjudged againſt the opinion of Hobart. ——Brownl. 18, 19. S. C. held accordingly by three judges contra. ——Noy, 26. S. C. ſays, that judgment was ready to be given for the plaintiff, but it was compounded in court. ——S. C. cited Ld. Raym. Rep. 521, 522. and agreed thereto; though otherwiſe in caſe of a bond, according to Noy's report of the ſame caſe.

[7. If *A. promiſes B. a feme, that if ſhe will marry him he will leave her worth* 100*l. at his death*, and after they intermarry, yet this does not diſcharge the promiſe which is to be performed after this is ended. Hob. Rep. 279. between SMITH AND STAFFORD.]

8. *A. and B. were indebted to C. by contract, and C. accepts a ſtatute of A. and brought debt againſt B.* It was ruled that the acceptance of the ſtatute was an extinguiſhment of the debt. Litt. Rep. 17. Hill. 2 Car. C. B. cites the caſe of Baſſet v. Wood.

9. If I *enfeoff J. S. with a proviſo* contained in the deed, *that it ſhall be lawful for me to revoke the feoffment, and afterwards I levy a fine to J. S. of the ſame land*, this is an extinguiſhment of the power of revocation; by Roll Ch. J. Sty. 389. Mich. 1653. Bird v. Chriſtopher.

## (C) In what Caſes there ſhall be Extinguiſhment by Unity of Poſſeſſion.

### By Act of the Party.

In ſuch caſe the rent is extinct for ever. Per Rolf. Br. Extinguiſhment, pl. 17. cites S. C.

[1. IF the *tenant enfeoffs the lord and two others*, this doth not extinguiſh the *ſeigniory*, for this ſhall be *revived if the others ſurvive*. 7 H. 6. 3.]

Br. Surrender, pl. 11. cites S. C.

[2. *So* if *leſſee for life grants his eſtate to leſſor and two others*, (admitting that it is not a ſurrender for a third part, as WISCOT'S CASE, 2 Rep. is,) if the others ſurvive the leſſor, the *rent* ſhall be revived, and therefore not extinguiſhed. 7 H. 6. 2. b.]

8 Rep. 79. contra.

[3. If *he who has common appendant purchaſes the land*, out of which it iſſues *in fee*, the common is extinct by it. 7 H. 6. 3. 18 E. 3. 30. b. 24 E. 3. 25. per WILBY, dubitatur 20 E. 3. Admeaſurement, 8.]

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[4. See 5 Aſſ. 8. that the *lord may have common in his own waſte* appendant to certain land.]

[5. If *he, who has common in groſs, purchaſes the land* out of which it iſſues, the common is extinct. 7 H. 6. 3.]

[6. *Shack common or mutual* common, in regard that I have common in your ground that you ſhall have in my land, ſhall not be extinguiſhed by unity of poſſeſſion for the neceſſity of the public good to uſe without incloſure. P. 12 Ja. B. per Cur. THE BISHOP OF LONDON'S CASE.]

[7. If

[7. If the *manor of S. be within the purlieu of the chace of D. and* after *the king comes to both*, this unity of poſſeſſion of the chace and manor ſhall not extinguiſh *the liberty of hunting in S. as a purlieu.* D. 17 El. 327. 3.] S. C. cited Arg. Poph. 167.

[8. Unity of poſſeſſion *of the land to which a way is appurtenant by preſcription, and* of the land *over which* the way is, will extinguiſh the way; for the preſcription is gone, and the way is againſt common right. Hill. 4 Jac. B. R. between * JORDAN AND ATWOOD, adjudged per three juſtices againſt two. Contra, 11 H. 7. 25. b. per Vavaſor.] * Ow. 121. S. C. reports it to be adjudged againſt the plaintiff, and that the way was not extinguiſhed.

[9. Unity of poſſeſſion *of a mill and pool to which a way is appendant with the land over which* the way is, will extinguiſh the way. † 21 E. 3. 2. b. 21 Aſſ. pl. 1. admitted. 19 E. 3. Nuiſance, 3. admitted; for there, upon partition between the daughters, the mill and way were aſſigned to one, and this was as a new grant. Contra, 20 E. 3. Admeaſurement, 8. ‡ 11 H. 4. 5.] † Br. Extinguiſhment, pl. 15. cites S. C. and Brook ſays, it ſeems that it is a new way.

‡ If one has a way or common appendant in another's land, and purchaſes the ſame land, and after parts with the land, yet the way or common is extinct for ever. Br. Extinguiſhment, pl. 11. cites 11 H. 4. 5. —— Fitzh. Extinguiſhment, pl. 4. cites S. C.

[10. If a *vill has a way to a church, and one of the vill purchaſes the land* out of which, &c. and after *aliens it*, yet this unity does not extinguiſh his way, becauſe it is a *thing of neceſſity*. Hill. 4 Jac. B. R. agreed in JORDAN AND ATWOOD'S CASE.] Fol. 936.

[11. If the *cuſtom of London* be, *that where two tenements are adjoining, and the one has a gutter* running by the tenement of the other, *that he cannot ſtop it*, unity of poſſeſſion doth not extinguiſh *this cuſtom, but that it* ſhall be revived after that they are ſevered; for the cuſtom *of London extends to all gutters which are in the land of another*, and ſo the cuſtom *is revived.* 11 H. 7. 25. b. Hill. 4 Jac. B. R. agreed in JORDAN AND ATWOOD'S CASE.]

[12. If *he who has White-acre ought to incloſe by preſcription againſt Black-acre*, unity of poſſeſſion of both by *purchaſe* doth not extinguiſh this preſcription. Paſch. 7 Jac. B. between INGRAM AND BARTLET; per three juſtices againſt one.] A fence ſhall be extinct becauſe it is not of neceſſity; for at the beginning there were no fences. Per Doderidge J. Lat. 154. cites 11 H. 7. 25. and 4 Rep. Terringham's caſe; and 22 E. 2. Br. Extinguiſhment, and D. 295.

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[13. If there hath been *uſed, time out of mind, &c. a water-courſe to run* from a river *over a cloſe* called the Hop-yard, *to a watering-place for* the watering of *the cattle of* the occupiers of a rectory, *and for other neceſſaries* of the ſaid occupiers, and after there is an unity of poſſeſſion in fee of the place from which, and of the hop-ground over which, and of the rectory and watering-place to which, in king H. 8. and after by him ſevered again, this § watering-place ſhall be *revived, becauſe it is a thing of neceſſity*, and *alſo the water-courſe is natural.* Mich. 2 Car. between SUREY plaintiff, and PIGOT and others defendants, adjudged upon demurrer.] Jo. 145. Shewry v. Pigot, S. C. reſolved per tot. Cur. that the water courſe was not extinct —— A water-courſe which uſed to have its current from ſuch a place to ſuch a place, and ſo to the plaintiff's yard to ſupply a pond with water for watering

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ing his cattle, is not extinct by unity of poſſeſſion. 3 Bulſ. 339. Paſch. 2 Car. B. R. Surry v. Piggot.——Becauſe it has exiſtence notwithſtanding the unity. Arg. Lat. 153. cites 12 H. 7. 4. ——And it is a thing diſtinct from the land, and alſo a thing of neceſſity, as in 12 H. 7. the caſe of a gutter. Arg. Lat. 153, 154.

14. A *rent* iſſuing out of lands in fee was *granted to tenant by the curteſy in fee*; it ſhall not be taken as extinct, but the rent will go to his heirs, although he himſelf could not have it; Arg. Godb. 128. cites 5 E. 3.

15. If *he who has a rent-charge comes to the land by tort, and after renders it to him who right has*, by this his rent is extinguiſhed; quære. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15. per Belk.

16. *But if the other recovers the land* againſt him *by the law*, the rent is revived. Ibid.

17. Unity of poſſeſſion of a *manor*, which is *within the cinque ports, which comes to the king as eſcheat as parcel of the honour of E.* and the *king grants it over*, this is no extinguiſhment of the franchiſe; therefore it ſeems that this *goes with the land, and not with the ſeigniory*, as in the caſe of Glouceſter-fee. Br. Extinguiſhment, pl. 9. cites 49 E. 3. 24.

18. *Annuity by a prior* againſt a parſon of a church, and *counted by preſcription*; it is a good plea to *ſay that A. B. was ſeiſed of the advowſon tempore H. 3. and gave the advowſon to the predeceſſor of the plaintiff in fee, who purchaſed it to hold in proper uſe*, ſo that the parſonage was appropriated in fee, for the unity of poſſeſſion determines the annuity. Br. Extinguiſhment, pl. 36. cites 2 H. 4. 19.

19. Where *lands of an abbot, charged with tithe, come to lay hands, and after return to the hands of the abbot*, yet it ſhall be diſcharged of the tithes; per Thirn; and therefore it ſeems that he ſhall pay to the tithe again. Br. Extinguiſhment, pl. 12. cites 11 H. 4. 34, 35.

20. An *executor, to whom the teſtator was indebted, may pay himſelf*; per Hill; *but Brook* ſays, the law ſeems to be *contra; for if he adminiſters as executor, the debt is determined.* Br. Executor, pl. 59. cites 12 H. 4. 21.

21. *Profit apprender* is extinct by unity; Arg. 3 Bulſt. 339. cites 14 H. 4. 7.

22. In aſſiſe, if a man *ſeiſed in fee grants a rent-charge in fee, and gives the land in tail*, and the *tenant in tail aliens to the grantee in fee*, and *he aliens to another*, and the *tenant in tail has iſſue and dies*, and the *iſſue brings formedon and recovers*, and the *grantee diſtrains*, and the iſſue ſays that he purchaſed the ſame land, and ſo extinguiſhed his rent, the grantee ſhall ſhew how after this the iſſue brought formedon and recovered, this ſhall not aid him to revive the rent. Br. Extinguiſhment, pl. 18. cites 19 H. 6. 45.

23. If a man has *warren in other land, and* after *purchaſes the land*, the warren is not extinct; for it is not like to a rent or common. Br. Extinguiſhment, pl. 5. cites 35 H. 6. 56.

24. In *debt* the *abbot of D. granted to W. S. a corody*, viz. ſo much of bread, and ſo of the reſidue, &c. *for* term of *his life, faciend' talia ſervic' prout J. N. & alii uſitat' fuer' facere*, and after the *grantee let the corody again to an abbot for ten years, rendering 3l. per ann.* and *he brought debt of the 3l.* and the *abbot ſaid that the grantee did*

*did not do the ſervice*, and the *grantee ſaid that he is not bound, for by the leaſe the * corody is ſuſpended*; and per Cateſby, the *ſervices ought to be done, for it is not ſuſpended by the ſecond leaſe, as* it is *in caſe of land leaſed by the tenant to the lord*; for *there he cannot diſtrain*; *but in this caſe the ſervices are to be done by his perſon, by reaſon of the grant of the corody*, therefore he ſhall do the ſervices, as well during the leaſe for years as before, for it is in effect a grant upon condition; and therefore, if he does not do the ſervices, he ſhall loſe the thing granted; contra of a feigniory in land, for there he may diſtrain, but here he has no other remedy for the nonfeaſance, but to retain for the condition. Br. Extinguiſhment, pl. 34. cites 20 E. 4. 12.

25. A *man leaſed land for years*; the *leſſee leaſes part of the term to the leſſor, rendering rent*, if *he after ſurrenders to the firſt leſſor*, the rent reſerved upon the ſecond leaſe is determined. Br. Extinguiſhment, pl. 34. cites 20 E. 4. 12. per Brian.

26. *And* if a man *leaſes lands* to one *for years, rendering rent*, the *leſſor grants the rent to W. S.* and after the *tenant for years ſurrenders*, the rent is not extinct. Ibid.

27. *And* if a man *enfeoffs me upon condition to render to him* 10*l. ſuch a day*, and after *I leaſe it to him for years, rendering certain rent*, and *at the day I do not pay the* 10*l.* now he ſhall retain the land, and the rent reſerved by me upon the leaſe is determined and extinct. Br. Extinguiſhment, in pl. 34. cites 20 E. 4. 18.

28. If a *man makes me his ſteward of his manor, with a fee of* 5*l. per ann. and a robe*, and after *I grant all this to an abbot for years, rendering rent; if the grantee does not hold the courts*, he ſhall not have the rent reſerved, quod Curia conceſſit. Br. Extinguiſhment, pl. 34. cites 20 E. 4. 12. per Cateſby.

29. If *three coparceners* are ſeiſed *of a manor* in fee, *to which a leet* or law day *is appendant*, and *the king purchaſes two parts* of the ſame manor *with the appurtenances*, yet the court leet by ſuch purchaſe is not extinct, but remains ſtill appendant to the third part of the ſame manor; and this was the opinion of the juſtices of C. B. Bendl. 20. pl. 30. Hill. 28 H. 8. Anon. cites 33 H. 6. fol. 9. & 15 E. 4. fol. 5. Trin. 6 E. 3. Fitzh. Quare Impedit, 40. Trin. 28 H. 8. Dier, fol. 30. p. 209.

And. 26. pl. 58. S. C. but adds a quære as to the intent; for at leaſt the king holds the leet with the third coparcener, and ſhe has not all the leet in her by reaſon of the alienation aforeſaid made by her two ſiſters, cites Hill. 28 H. 8.

30. *Tythes* are not extinguiſhed by unity of poſſeſſion. Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. Wickham (Bp. of Lincoln) v. Cooper.

Le. 248. S. C. —— Le. 300. Stile v. Miller.

31. A farmer of the king of a capital meſſuage makes a *conduit* to convey the water to his houſe, which he carries acroſs the land of a copyholder of the manor; after the king grants the capital meſſuage to A. with the appurtenances, and the *copyhold* was granted to another perſon. The farmer, to amend the pipe, breaks the land of the copyholder; adjudged juſtifiable, becauſe terra tranſit cum onere. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. Guy v. Brown.

32. *Common* is deſtroyed by unity of poſſeſſion. Arg. Poph. 166. cites as to the common. 4 Rep. Terringham's caſe. Goldſb. 3. pl. 6. Abbot of Weſtminſter's caſe.

By the copyhold eſcheating to the lord, the ancient common is extinct, and if by a new grant he grants common with it, it is a new and not the ancient common. Cro. E. 794. pl. 40. Mich. 43 Eliz. C. B. Worledge v. Kingſweil

Commoner by preſcription takes a leaſe of the land out of which, &c. for twenty years, this does not deſtroy the preſcription, becauſe the ſuſpenſion is only to the poſſeſſion and not to the right, and the inheritance of the common ſtill continues. Co. Litt. 114. S. ——Common appendant, and liberty to convey water, to avoid nuiſances, and ſuch things of neceſſity, no unity can extinguiſh, and ſhall paſs as appendant & quaſi incidents to their principal. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. in caſe of Guy v. Brown.——Common appendant is extinct by unity, per Crew Ch. J. 3 Bulſt. 341. in caſe of Sury v. Pigot, cites 4 Rep. 38. Terringham's caſe.

[ 449 ] 33. *Things which have their original out of land, and not otherwiſe, and are due in reſpect of the land only, and are part of the profits* of the land, are always extinguiſhed by unity of poſſeſſion, if a man has an *equal eſtate in both*; as are ſeigniory, rent-charges, commons, ways, &c. *But things* not iſſuing out of lands as part of the profits, but being derived otherwiſe, and *due in another reſpect*, though they be taken and had within certain lands, are not extinguiſhed by unity of poſſeſſion, as warrens, franchiſes, waife, ſtray, wreck, leet, &c. and things which are part of the profits of the land, and payable by ſuch perſon only who has the land, yet if they commence upon any perſonal reſpect, and not in reſpect of the land, and ſo the perſon is only charged, and not the land, are not extinguiſhed by unity of poſſeſſion, as annuities, tythes, proxies, &c. Dav. 5, 6. Trin. 2 Jac. in Scacc. in the caſe of Proxies.

Per Crew Ch. J. Ibid. 172. becauſe the preſcription was gone, cites 3 Jac. Day v. Drake. 34. *Incloſure* is deſtroyed by unity of poſſeſſion, becauſe it is not natural as a water-courſe is; per Whitlock J. Poph. 170. Paſch. 2 Car. B. R. in caſe of Sury v. Pigot.

——It is extinguiſhed and not to be revived. Arg. 3 Bulſt. 339. in caſe of Sury v. Pigot, cites 39 Eliz. Harrington's caſe.——D. 25. b. pl. 19. but no judgment. ——Adjudged Vent. 97. Bolus v. Henſtock. ——Raym. 192. Bolus v. Henſtock, S. C. but no judgment.——A fence is, per Doderidge J. Lat. 154.——Arg. 3 Bulſt. 339. cites 36 Eliz. B. R. Hernden v. Crouch.

35. *Things which have no exiſtence during the unity are extinguiſhed by the unity.* See Lat. 153. Trin. 2 Car. in caſe of Sury v. Pigot.

Noy, 84. in caſe of Sury v. Pigot, cites it as Lady Brown's caſe. 36. A. has a *ſtream of water, which runs through a leaden pipe*; if B. purchaſe the land where the pipe is, and cuts and deſtroys it, the water-courſe is extinct, becauſe by this he declares his intent and purpoſe, that he will not enjoy them together. Per Doderidge. Palm. 446. Mich. 2 Car. B. R. in caſe of Sury v. Pigot.

Noy, 84. S. C. 37. If a man has a *mill*, and a *water-courſe* to it over his land, and *ſells the land*, the water ſhall not be ſtopped, being matter of neceſſity, and not like the caſe of a way, therefore not to be extinct by unity, becauſe of *neceſſity*, and the ſame hath a continual running; per Doderidge J. 3 Bulſt. 340. Paſch. 2 Car. B. R. in caſe of Sury v. Pigot.

38. There

38. There is a *difference between a way*, and a *common*, and a *water-courſe*; the two firſt begin by private right, by preſcription by aſſent, and may be extinct by unity, becauſe the greater benefit ſhall drown the leſs; but a water-courſe begins only ex jure naturæ, having taken this courſe naturally, and cannot be averted. Per Whitlock J. 3 Bulſt. 340. Paſch. 2 Car. B. R. in caſe of Sury v. Piggot.

39. *Way* is extinct by unity. Arg. 3 Bulſt. 339. cites 11 H. 4. 5.—and not to be revived. Ibid. cites Hill. 4 Jac. B. R. Jordan v. Atwood.—Cited D. 295. Marg. pl. 19.—*Private* ways are extinct by unity, but not ways * of *neceſſity*, as to the *church* or *market*. Per Doderidge J. and ſays that Popham's opinion was ſo. 3 Bulſt. 340. Paſch. 2 Car. B. R. in caſe of Sury v. Piggot.

Becauſe it has no exiſtence during the unity, and therefore is gone. Arg. Lat. 153.——

* Or to land of vendee, there being no other way. Cro. J. 170. Clerk v. Cogg.——2 Sid. 39. 111. S. P. Packer v. Wellſtead.——A croſs way of eaſe is extinguiſhed by unity. But not if it be a croſs way of neceſſity. Per Doderidge J. Noy, 84. in caſe of Surry v. Piggot.

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40. *Warren* is not extinguiſhed by unity of poſſeſſion, becauſe a man may have warren in his own ſoil. Per Whitlock J. Poph. 170. Paſch. 2 Car. B. R.—And becauſe warren and *tythes* are things *collateral* to the land. Per Crew Ch. J. Ibid. 172.

Becauſe if he has exiſtence notwithſtanding the unity. Arg. Lat. 153. cites 35 H. 6. 55, 56. 11 H. 7. 25. D. 326. b. pl. 3.

41. There were two houſes, and the one preſcribed that the other ſhould mend the *gutter*, and afterwards they come to the hands of one man, and then he aliens one of them. This unity ſhall deſtroy the mending of the gutter. Arg. Poph. 166. cites 11 H. 7. 25.—It was argued on the other ſide, that this was by the cuſtom of London. Ibid.—Per Whitlock J. the gutter was not *extinguiſhed* only by the unity of poſſeſſion, but there alſo appeareth in the caſe that the *pipes were deſtroyed*, whereby it could not be revived. Ibid. 170.——Per Doderidge J. a reaſon is given in the caſe of 11 H. 7. 25. why a gutter is not extinguiſhed by unity of poſſeſſion. 2dly, Becauſe it is a matter of neceſſity. Ibid. 172, 173.

Caſe for ſtopping a gutter through which water deſcended to, &c. The declaration was, that he was poſſeſſed of a houſe and yard, and that he and all, &c. It was excepted to, becauſe he lays himſelf but in poſſeſſion of, &c. and alleges not a ſeiſin in fee (as he ought to do) in the perſon in whom he preſcribes. But he granted it would have been good if he had laid a poſſeſſion of the gutter; but this he does not neither, ſo that it comes within neither of the rules; judgment was ſtayed till moved of the other ſide. 2 Show. 81. pl. 66. Mich. 31 Car. 2. B. R. Pepyn v. Buſtin.

42. *A. had three parcels of land, and there was a private way out of the firſt parcel to the ſecond, and out of the two firſt parcels to the third* parcel. *J. S. purchaſed all thoſe parcels, and then aliened the two firſt* to J. N. The jury found that *there was no other way to come at the land not aliened, but through the other two parcels.* This way being abſolutely neceſſary, it was adjudged per tot. Cur. that the way continues, and is not deſtroyed by the unity. 2 Sid. 39. and 111. Mich. 1658. B. R. Packer v. Wellſtead.

43. *Where* an unity of poſſeſſion extinguiſhes *a preſcriptive right*, it is requiſite that the party *have an eſtate in the lands a qua, and* in

the lands *in qua, equal in duration, quality, and all other circumſtances of right.* Carth. 241. Paſch. 4 W. & M. in B. R. The King v. the Inhabitants of Hermitage.

44. It was admitted, that where any matter of *intereſt or charge* is claimed upon men's eſtates, as rents, commons, &c. ſuch are always *extinguiſhed* by unity of poſſeſſion, and never revived. 4 Mod. 364. Mich. 6 W. & M. in B. R. in caſe of Peers v. Lucy.

## (D) Cuſtoms.

### [*Extinguiſhed by Unity of Poſſeſſion.*]

By unity of poſſeſſion all cuſtoms and ſervices annexed to ſeigniory or to the lord are extinct, as heriot cuſtom, ancient demeſne, fine for alienation or cuſtom to be ledle to the lord, or to collect his rents and the like. But contra of cuſtom running with the land, as gavel-kind, Borough-Engliſh [pl. 6. infra], dowment of the whole land, and the like; for this runs with the land, and in this caſe unity of poſſeſſion in the lord and feoffment by him after ſhall not change the cuſtom; for this runs to a number and throughout the whole * country or manor, and not to the ld. as a ſingle perſon, as in the other caſes before. Br. Avowry, pl. 46. cites 14 H. 4. 2.——Br. Extinguiſhment, pl. 14. cites Br. Cuſtoms, pl. 19. cites S. C.——Fitzh. Extinguiſhment, pl. 14. cites S. C.——S. P. in the caſe of the king as to gavelkind and the like, which runs with the land, or in caſe of Glouceſter fee, or where the cuſtom is, that he that is ſeiſed of a tenement in O. for 40 weeks ſhall not be ouſted but by the king's writ, although he has no title, that if the king becomes ſeiſed of the land, yet it does not extinguiſh the cuſtom; but where the ſeiſin of the king is reverſed by judgment in parliament, ſo that his ſeiſin is defeated, there if the cuſtom was gone before and the land at the common law, yet now the cuſtom is revived by this repeal, and ſo it was adjudged. Br. Extinguiſhment, pl. 16. cites 21 E. 3. 46.——Br. Error, pl. 65. cites S. C.

[1. IF a cuſtom be *annexed to the ſeigniory*, there unity of poſſeſſion *of the tenancy and ſeigniory* does not extinguiſh the cuſtom. 14 H. 4. 8.]

* [ 451 ]

Br. Avowry, pl. 46. cites S. C.——Fitzh. Extinguiſhment, pl. 12. cites S. C.

[2. If a cuſtom be *that every tenant of an honour ſhall pay a fine of alienation*, if the *lord purchaſes a tenancy, or* has it *by deſcent or eſcheat, and* after *aliens it* again, yet the cuſtom is deſtroyed in this by the unity of poſſeſſion. 14 H. 4. 3. adjudged.]

[3. And *note*, that *this cuſtom is particular*, for though it trenches to divers tenants, yet of the part of the lord but to one. 14 H. 4. 7.]

[4. *But* if a *cuſtom* be *general throughout the county*, there unity of poſſeſſion of the *lord* doth not extinguiſh the cuſtom, though it be annexed to the ſeigniory. 14 H. 4. 7.]

Br. Cuſtoms, pl. 19. cites S. C.——Br. Avowry, pl. 46. cites S. C.——Fitzh. Extinguiſhment, pl. 14. cites S. C.

[5. *But* if a cuſtom be *annexed to the tenancy*, the unity of poſſeſſion of the tenancy and ſeigniory does not extinguiſh the cuſtom. 14 H. 4. 8.]

Br. Cuſtoms, pl. 19. cites S. C.——Br. Avowry, pl. 46. cites S. C.——Fitzh. Extinguiſhment, pl. 14. cites S. C.

[6. *As* if *the lord purchaſes land in gavelkind or Borough-Engliſh of the tenant*, this doth not extinguiſh the cuſtom, becauſe it is annexed to the tenancy. 14 H. 4. 8. 11 H. 7. 25. b.]

[7. If

[7. If *A. ſeiſed in fee of a houſe, which has certain lights by preſcription, and B. has another houſe next* adjoining *to it, and B. tortiouſly erects a ſtructure upon his franktenement*, which over-hangs the houſe of A. and thereby ſtops his lights, and after *B. purchaſes in fee the houſe of A. and* after *grants or leaſes over to C.* the houſe which was *the houſe of A.* C. has not any remedy to abate this nuiſance; for by the unity of poſſeſſion the *preſcription for the lights* was extinguiſhed, ſo that C. ought to take it in ſuch plight as it was at the time of the grant * made to him; for the unity purges the tort, both being in the ſame hand, who might do with it at his pleaſure. Per Cur. Hobart's Rep. 175. between ROBINS AND BARNES.]

Hob. 131. pl. 173. Hill. 13 Jac. S. C. accordingly.

* Fol. 937.

[8. *So* it is *if B. after pulls down his houſe, and rebuilds it* in the ſame manner *as it was before*, ſo that he doth not make it to over-hang more than it did over-hang at the time of the grant made to C. Hob. Rep. 175. agreed per Cur.]

Hob. 131. pl. 173. Hill. 17 Jac. S. C. accordingly.

[9. *But if he makes it to over-hang more than before*, action lies for C. to remedy it, for it is a *new tort*. Hob. Rep. 175. in the ſaid caſe of ROBINS AND BARNES.]

Hob. 131. pl. 173. Hill. 17 Jac. S. C. accordingly.

[10. If *A. ſeiſed of a houſe in fee, in which he has lights by preſcription, and* after *purchaſes another houſe in fee next adjoining*, and after grants or *leaſes the houſe which has the lights to C.* the *preſcription is revived*, for this is but an *eaſement* running † with the houſe, and therefore not extinct by the unity. Hob. Rep. 175. dubitatur.]

Hob. 131. pl. 173. Hill. 17 Jac. S. C. accordingly. ——Ibid. Hobart Ch. J. ſays, note, there is a great difference between intereſts and profits, as rents, commons, &c. and bare eaſements, ſuch as are lights, air, gutters, ſtillicidia, and the like; for though while they are in one hand they may be ſtopped or foredone, becauſe a man cannot be ſaid to wrong himſelf, yet if they be divided, things of that nature (ſtill in being) do revive, becauſe they are of no leſs uſe of themſelves in one hand than in divers, being equally (rebus ſtantibus in the ſame uſe and occupation) neceſſary for the ſeveral houſes to which they belong; but clearly, if even ſuch things be foredone or altered while they are in one hand, and ſo being the houſes be again divided, they cannot be reſtored by law, but muſt be taken as they were at the time of the conveyance.

† [452]

11. *Two have tenements adjoining*, and *the one has a gutter in the other's land*, and after the *one purchaſes both, and after he aliens the one to one, and the other to another*, the gutter is revived, notwithſtanding the unity, &c. by reaſon that it is very neceſſary; *contra if he, who had both, had broke the gutter*. Br. Extinguiſhment, pl. 60.

## (E) Acts in Law.

[1. IF *lands deſcend to two coparceners, out of which one has a rent-charge* iſſuing, this does not extinguiſh the rent, but only ſuſpends it; for after partition it ſhall be revived. 7 H. 6. 3.]

Br. Extinguiſhment, pl. 17. cites S. C. —— For it is the joint act of both parties. S. P. Arg. Hetl. 71.

[2. *So* it is if lands deſcend to two coparceners, *whereof one has the ſeigniory*, this does not extinguiſh the ſeigniory. 7 H. 6. 4.]

And after partition the rent ſhall revive for the portion. Br. Extinguiſhment, pl. 17. cites S. C. —— And if in ſuch caſe the father has

has one acre within the ſeigniory of that daughter, and another acre not within it, and the two daughters enter and make partition, and this laſt acre is allotted to the other ſiſter who has not the rent or ſeigniory, there the rent or ſeigniory is revived in toto. Ibid. pl. 25. cites 9 Aſſ. 22.

[3. If the *meſne takes the tenant to wife*, this does not extinguiſh the meſnalty, but only ſuſpend. 7 H. 6. 3. b.]

[4. *But* if the meſne and tenant intermarry, and *have iſſue, and the meſnalty and tenancy deſcend to the iſſue*, this extinguiſhes the meſnalty, and ſhall not be revived after, though the iſſue dies without iſſue, by which the meſnalty ought to go to the heirs of the part of the father, and tenancy to the heirs of the part of the mother, for this was not intended at the time of the conjunction of the eſtates. 7 H. 6. 3. b. dubitatur.]

5. *Lord and tenant*, the *tenant leaſed for life, remainder over in fee*, and he in *remainder dies without heir*, there the remainder is fallen, and the *ſeigniory is extinct immediately*, and the lord ſhall not after have any ſervices of the tenant for life, who was his tenant before; quod nota; and ſo ſee that he in remainder is tenant, though he is only tenant to the avowry, which ſee plainly in SKRIVENER'S CASE, 15 E. 4. 13. Br. Extinguiſhment, pl. 3. cites 3 H. 6. 1.

6. If *executor*, who has a leaſe for years by his teſtator, *purchaſes the franktenement*, the leaſe is clearly extinguiſhed. Br. Surrender, pl. 52. cites 4 E. 6.

[453] 7. Quale jus, where a *man purchaſes a fee-farm*, &c. *of an abbot*, viz. *certain land, rendering to the abbot and to his ſucceſſors* 20 *l. per annum*, there, if *all the monks die*, the rent is extinct, notwithſtanding others are newly created there; per Newton and Paſton. Br. Extinguiſhment, pl. 35. cites 20 H. 6. 7, 8.

8. In *annuity*, the *plaintiff made title that all his predeceſſors were ſeiſed of an annuity by the hands of one A. parſon of the church of D. and all his predeceſſors, time out of mind*, &c. *till ſuch a year*, &c. *and for the annuity arrear he brought this action.* The *defendant ſaid, that the parſonage is, and has been, appropriate to the priory of B. before time of memory, which is the abbey of Caen in Normandy, and that E. 3. ſeiſed their poſſeſſions for war*, and the land of all priors aliens, *which continued till king H. 5. and anno 2 H. 5. all theſe were given to the king and his heirs, and king E. 4. granted this parſonage to the dean of St. Stephens, and to his ſucceſſors, diſcharged as it was in his hands*, and *the other demurred*; and if the parſonage be diſcharged or not, is the queſtion; *or if the annuity be extinct by reaſon of the appropriation?* and *it ſeems in a manner by all, quod non*, but whether it was gone by the poſſeſſion of the king, and by the act of parliament which gave the poſſeſſion to the king in fee, or be revived by the gift to the dean in fee or not, &c. and by the beſt opinion it is *not determined, but ſuſpended during the poſſeſſion of the king, and is now revived; for the perſon of the parſon was charged by reaſon of the parſonage, and not the land*; and though the king cannot be a parſon, yet it is only a ſuſpenſion, *and when there is a new parſon made, this is revived*; but per Vavaſor, the gift of the land by act of parliament diſcharges the annuity, becauſe every one is party to the act, but no other ſaid ſo; and as it ſeems this cannot be,

becauſe the parſon was charged, and not the land; and where a parſon has annuity of the vicar, and he enters into the vicarage, this is no bar in writ of annuity, [and cites] 10 H. 5. for the parſon is charged, and not the ſoil, and ſo no ſuſpenſion; and per Frowike J. the writ of annuity lies well, and the annuity is not determined; quære. Br. Extinguiſhment, pl. 22. cites 21 H. 7. 1.

9. And per Butler, if a *parſon grants an annuity, and reſigns*, and after the *patron and ordinary confirms it*, this is not good; for it was determined before by the reſignation. Ibid.

10. *And* per Butler, *if a man had had common in this land*, yet now they may uſe their common again, notwithſtanding the act of parliament; quære in manus regis; for, per Kingſmill, they are not out of poſſeſſion by office, which entitles the king to the land. Ibid.

5. If *land, out of which rent is granted, be recovered by eigne title*, all the rent is extinct; but if a *diſtreſs* for the ſame rent be *limited on other land*, and that land be *evicted*, yet all the rent remains. 7 Rep. 24. b. cites the opinion of Finchden, in 41 E. 3. 15. and affirmed it for good law in BUT'S CASE. Trin. 42 Eliz. C. B.

12. Note, this difference was taken by Saunders, viz. that if a *leſſee for years as executor purchaſes the reverſion, this ſhall extinguiſh the term*, becauſe it is his own act; *but if one that hath a reverſion be made executor, and hath a term that way, that ſhall not* be an extinguiſhment, *becauſe the term and the reverſion are conjoined by act in law*. Freem. Rep. 289. pl. 338. Hill. 1676. Anon.

## (F) What Thing ſhall be extinct by a Feoffment, or other Act of the Party. [454]

[1. IF *the lord enfeoffs the tenant of the land ſince quia emptores*, (admitting that he may, but quære how he can, the tenant being in poſſeſſion,) *this extinguiſhes the ſeigniory*. 3 H. 6. 43. b admitted, 17 E. 3. 32. 22 E. 3. 18. b. Curia. 39 E. 3. 20. b.]

[2. If *the lord* of a manor, *who has common de jure in his waſtes, aliens the waſtes*, this extinguiſhes his common. 18 E. 3. 44. * 18 Aſſ. pl. 4.] * Br. Commoner, pl. 22. cites S. C.

[3. If a *man makes feoffment of land, in which he has a common appendant*, this extinguiſhes the common for ever. M. 9 J. B. R. per Cur. between CATESBY AND WILKINSON.]

[4. If *A. poſſeſſed of a term* for years *deviſes it to his wife for* 18 *years, and after to B. his eldeſt ſon for life, and after to the eldeſt iſſue male of B. for life*, and dies, and after the 18 years *B. enters*, and is poſſeſſed, *and after C. his eldeſt iſſue male is born*, and after *B. makes feoffment in fee* of the land, *and dies*, this ſhall not deſtroy the eſtate of C. he being born before the feoffment, 8 May 1638. 14 of king Charles, upon a reference out of Chancery to juſtice Jones, Crook, and Berkley, between COTTON AND HEATH. By the ſaid juſtices reſolved, and ſo certified accordingly; and it was

then ſaid that the opinion of the Ld. Keeper was accordingly. See 8 Rep. 96. b.]

5. An *abbot*, having occaſion to go beyond ſea, *made J. S. his procurator to preſent* to ſuch benefices as became void in his abſence. J. S. *preſented, in the abbot's name, to one of his own benefices* or advowſons. It was held, that the right of his own advowſon did not paſs; but yet it is an uſurpation of the abbot to that church; Arg. Godb. 319. cites 17 E. 3. 60.

6. *Lord meſne and tenant*, the *tenant holds by 3d. of the meſne*, and *he over the lord by a penny*, and the *meſne dies without heir*, and the *meſnalty eſcheats to the lord*; by this the ſeigniory is extinct in the meſnalty, and the *meſnalty is now all the ſeigniory which the lord has*; and therefore now he who was lord ſhall have 3d. where he ſhould have but a penny before. Br. Extinguiſhment, pl. 39. cites 20 Aſſ. 29.

7. If *conuſor enfeoffs the conuſee* after execution, this extinguiſhes the execution, notwithſtanding that the feoffment be *upon condition*, and the condition is *broken*, and the conuſor re-enters. Br. Feoffment de Terres, pl. 6. cites 46 E. 3. 30.

8. Where the *lord releaſes part of his ſervices*, yet the reſt remains, ſo that a man cannot plead hors de ſon fee. Br. Avowry, pl. 46. cites 14 H. 4. 2.

9. If *lord, meſne and tenant* are, and the *lord releaſes to the tenant all his right*, by this the *meſnalty is extinct*; for the *meſne has not the meſnalty but in reſpect of the charge over*, that if the charge over be determined, there is no more cauſe to have ſervice of the tenant paravaile. Br. Extinguiſhment, pl. 38. cites 8 H. 6. 24.

10. *But* per Librum Little, in releaſes, *if there was a ſurplus of ſervice*, the meſne ſhall have it, notwithſtanding the releaſe as a rent-ſeck. Ibid.

[455] 11. *So* by 7 Aſſ. pl. 2. if the *tenant enfeoffs the lord*, the meſnalty is determined. Ibid.

12. Note, the *king may extinguiſh a corody by a grant or releaſe to an abbot*. Br. Extinguiſhment, pl. 42. cites 8 H. 7. 12.

13. *But* he cannot extinguiſh *tenure*, by reaſon of his prerogative; for the *land ought to be held of ſomebody*. Ibid.

14. Per Huſſey, if the *baron has a term by his feme, and makes a feoffment in fee upon condition*, and *re-enters for the condition broken*, and the *leſſor enters*, and the *baron dies*, the feme ſhall not have the term; for the baron had power to forfeit it. Br. Extinguiſhment, 59. cites 11 H. 7. 25.

15. As if the *lord grants the ſeigniory to the diſſeiſor of his tenant*, and the *tenant re-enters*, yet the ſeigniory is extinct. Ibid.

16. If a man *leaſes to one for 10 years, and after leaſes the ſame land to another for 20 years*, and the *firſt leſſee purchaſes the reverſion in fee*, yet the firſt leaſe is not extinguiſhed, becauſe the ſecond leaſe, which is for twenty years, is meſne between the firſt leaſe and the fee-ſimple, which is an impediment of the extinguiſhent. Br. Extinguiſhment, pl. 54. per Hales.

17. A *releaſe* of all the right to the land does not extinguiſh *tythes*, for they are not iſſuing out of the land. Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. Wickham Bp. of Lincoln v. Cooper.

18. *Feoffment*

18. *Feoffment by leſſee* is an extinguiſhment of his term; per Poph. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. in caſe of Read and Morpeth v. Errington, alias Mitford v. Fenwick.

19. If one *executes authority* in any land given by another, he does not extinguiſh *his own intereſt* in it, as if leſſee for years makes livery as *attorney* of the leſſor. Mo. 605. pl. 835. Hill. 42 Eliz. B. R. Diggs's caſe. So of land ſold by *commiſſioners of bankrupts*, where one has right. Godb. Arg. 312.

So of ſale of land by executor, Arg. Godb. 319.—So if executor makes feoffment by force of the will, he aſſets nothing of his own right but only as executor. Arg. Godb. 307. ——Executor cannot make feoffment, but ought to make a ſale, and the vendee, viz. the bargainee, is in without livery; but if he makes livery in his own name, then he gives away his own right. Arg. Godb. 314. cites 19 E. 3. 17. a.——If attorney gives livery in the name of his maſter, he gives nothing of his own right, but if in his own name, it is otherwiſe. Arg. Godb. 314. cites 49 E. 3. 17. a.

20. If the *tenant deviſes that the lord ſhall ſell the land*, and the lord ſells the land, yet the *ſeigniory remains*. Co. Litt. 52. a.

21. *Leſſee for life makes feoffment, and a letter of attorney to leſſor to make livery*, who does ſo, yet he ſhall enter for the *forfeiture*. But had it been *leſſee for years* that had made ſuch feoffment, it ſhould bind the leſſor; for leſſor cannot make livery as attorney to leſſee for years, becauſe he had no freehold of which to make livery but that was in the leſſor. Co. Litt. 52. a.

22. Upon the ſtatute 13 *Eliz.* 4. *which makes lands of receivers liable for their debts*, if the *king ſells*, the right of the accomptant paſſeth, but not the king's right. Arg. Godb. 319. in pl. 417. Paſch. 21 Jac. in the Exchequer.

## (F. 2) Avoided or prevented. By what Act. [456]

1. THE *grantee of a rent-charge purchaſed parcel of the land*, and the *grantor granted him that, notwithſtanding this he might diſtrain in the reſt of the land*, and that the grant ſhall ſtand in force, and Finch. held that it was good, by which the other ſaid that he did not charge by the deed. Br. Charge, pl. 48. cites 46 E. 3. 32.

2. A. makes a *leaſe for years* to J. S. *rendering rent*, and then *grants the reverſion for* 40 *years to B. and C.* which he *afterwards conveyed to them and their heirs* by bargain and ſale, and covenanted to levy a *fine* accordingly, *to make them tenants to the præcipe*, to ſuffer a common recovery *to another uſe*; the bargain, fine, and recovery, were all executed, and it was adjudged that they made all but one conveyance, and that the reverſion was not deſtroyed, and by conſequence the *rent not extinguiſhed*; for though the bargainor might intend to deſtroy the reverſion, by making this grant to them and their heirs, yet the bargainees could never have ſuch *intention*, and though they were now ſeiſed to another uſe, yet by the *ſtatute of uſes* their former right is ſaved, which they had to their proper uſe; and their intention being only to make a tenant to the præcipe, the ſtatute *ſhall be ſo conſtrued, that the intent of the parties ſhall ſtand*. Arg. 2 Mod. 234. in caſe of Addiſon v. Sir John

2 Roll. Rep. 245. Farrows v. Farmer.—Cro. J. 643. S. C.

John Otway, cites 2 Roll. Rep. 245. Mich. 20 Jac. B. R. Farrowes v. Farmer.

3. *A. conveyed* lands *to B. in fee*, with a *covenant to make further aſſurance;* afterwards *B. leaſes to A. for* 40 *years*, and then *A. makes further aſſurance upon requeſt;* this bars and conveys the leaſe for years, unleſs there were ſome *precedent agreement* to the contrary. But if there had been any ſuch precedent agreement, then they held that it would have operated only in *confirmation and corroboration* of the leaſe, and would not have deſtroyed it. Per Hale Ch. B. Hardr. 402. Paſch. 17 Car. 2. in Scacc. cites it as one Heale's caſe.

Fol. 938.

## (G) Suſpenſion.

### [*Of Rent or Common.*]

[1. IF *leſſor* for years *enter into part* of the land, all the *rent* is ſuſpended. 7 H. 6. 26. Curia.]

Hob. 190. pl. 236. S. C. but S. P. does not appear. —Hutt. 6. S. C. but nothing ſaid as to the ſuſpending the rent. ——— Brownl. 69. Darrel v. Andrews, S. C. & S. P. as to entry into part, but not ſaid to be by licence, but no opinion as to the extinguiſhment.

[2. If a man leaſes for years, rendering rent, and *leſſee leaſes it to another at will*, and the *firſt leſſor at the rent-day enters into part of the houſe leaſed by licence of the leſſee at will*, yet this doth not ſuſpend his rent. This was adjudged in B. between DARREL AGAINST ANDREWS AND COPE. And P. 15 Ja. B. R. this was affirmed and admitted per Cur. and the counſel at the bar.]

See pl. 2. and the notes there. [457]

[3. If a man leaſes for years rendering rent, and the leſſee leaſes it to another at will, and the leſſee at will licenſes the firſt leſſor to enter into part of the houſe, and the *leſſor, by force of his licence, enters and continues* there *by the ſpace of half a year, during which time the rent-day incurs;* yet this doth not ſuſpend his rent, for the leaſe at will is not determined by the licence to enter, for this does not amount to a leaſe for half a year, for the licence was not for any time certain, but only to enter; and after he continued there by virtue of this licence, *by permiſſion*, for the time aforeſaid. This was adjudged in B. between DORREL AGAINST ANDREWS AND COPE, and Paſch. 15 Ja. B. R. this was affirmed and adjudged per Cur. P. 16 Ja. B. R. in a new action between the ſame parties, this was adjudged again upon a demurrer.]

See tit. Common, (E. a) pl. 11, 12. and (F. a), pl. 3.

[4. If a *commoner incloſes part of the waſte*, out of which he has common iſſuing, this ſuſpends his common. P. 1 Ja. B. adjudged in BRADSHAW'S CASE.]

Br. Arrearages, pl. 17. cites S. C. and S. P

5. In aſſiſe a man *leaſed land for life, rendering* 10*l. rent per ann.* The *rent of one day is arrear*, and the *leſſor diſſeiſes the leſſee*, and after *another day paſſes*, and the *leſſee brought aſſiſe of the land, and recovered*, and the *leſſor brought aſſiſe of the rent*, and the *term incurred*

*curred during the ſeiſin of the leſſor by diſſeiſin* was recouped in damages, and of the term arrear before the diſſeiſin, the leſſor recovered it in damages; and ſo ſee that the *unity of poſſeſſion in the land does not extinguiſh the rent which was due before the diſſeiſin*; quod nota. Br. Extinguiſhment, pl. 24. cites 8 Aſſ. 37.

6. *Aſſiſe of common of paſture*, the *tenant pleaded that in the time of E. 2. the one land and the other were in the ſeiſin of W. and ſo by unity the common is extinct*; the *other ſaid that the land, to which he claimed to be appendant, is ancient land, to which common has been appendant, time out of mind*, and therefore the aſſiſe awarded. Br. Extinguiſhment, pl. 27. cites 14 Aſſ. 21. & concordat 15 Aſſ. 2. It. North. But Brook ſays that it is againſt law, and that the unity is extinguiſhment for ever.

7. If leſſor does any thing that amounts to an *entry*, *though he depart preſently*, yet the poſſeſſion is in him ſufficient to ſuſpend the rent, and he ſhall be ſaid *extratenere* the leſſee, until the leſſee has done an act that amounts to a re-entry. Le. 110. pl. 149. Paſch. 30 Eliz. C. B. Cibel v. Hills.

8. In debt for rent, reſerved on a *leaſe of a warren of conies*; the defendant *pleaded that the plaintiff had plowed a field parcel of the warren, by which the conies had not ſufficient paſture*; but the Court (abſente Anderſon) held it no plea; for it is not a rent, but a ſeigniory [ſum] in groſs, due by reaſon of the contract, by which the entry or uſer of that part is not any ſuſpenſion. Noy, 60. 37 Eliz. Anon.

9. In debt on a demiſe for rent, the *defendant pleaded that before the rent due the plaintiff did enter upon him, but* did *not ſay that he did expel or hold him out*, and ſo iſſue was taken upon *non intravit*, and *found for the defendant*, and judgment given for him; for though the plea in bar was inſufficient, yet the verdict was full to the iſſue. Hob. 326. pl. 396. Trin. 17 Jac. Rot. 862. Reynolds v. Buckle.

Comb. 380. Trin. 8 W. 3. B.R. the S. C. cited by Holt Ch. J. who ſaid he took the caſe to be miſprinted; for the entry is no bar. Expulſion makes the firſt part of the bar, and holding out the reſt. The book ſays, it was found for the defendant, which could not be, the judge muſt direct the jury otherwiſe.

10. *Entry* and taking poſſeſſion *by command of leſſor* does not ſuſpend the rent; but if he commands to *eject leſſee*, this ſuſpends the rent. Palm. 150. Mich. 18 Jac. B. R. Heydon v. Godſale.

11. *Taking away a penthouſe*, fixed to the premiſes, is a treſpaſs, but no ſuſpenſion. 2 Jo. 148. Paſch. 33 Car. 2. B. R. Roper v. Loyd.

## (H) What Act will make a Suſpenſion. [458]

### [*Of Part or of the whole.*]

[1. A *Rent ſervice* cannot be ſuſpended *in part by the act of the party*, and in eſſe for the other part. Co. Litt. 184. b.] 2 Lev. 143. Trin. 27 Car. 2. B.R.

Twiſden J. ſaid, that what is ſaid by Cook, that rent ſervice cannot be ſuſpended in part, and in eſſe in part, is without reaſon and authority. ——9 Rep. 134. b.

[2. If

Aſſiſe of a rent, a man ſeiſed of four acres of land has

[2. If the *land, out of which the rent iſſues, deſcends to the grantee of the rent and another as coparceners*, till partition, the rent is ſuſpended *as to the diſtreſs*. 34 Aſſ. 15.]

iſſue a ſon and a daughter by one venter, and two daughters by another venter, and granted 100 l. out of his land to his ſon in fee, the ſon died without iſſue in the life of his father; the father died; the land deſcended to the three daughters; and becauſe the intire rent deſcended to the eldeſt daughter who is of the whole blood to her brother, therefore it is not extinct but for the portion; quod nota, per award by advice of all the juſtices. Br. Extinguiſhment, pl. 31. cites S. C.

Cro. Jac. 527. pl. 2. S. C. but not exactly S. P.

[3. If *tenant in tail*, the *remainder in tail* are, and tenant in tail *grant a rent in fee to him in remainder*, this is not any ſuſpenſion of the rent, inaſmuch as it iſſues out of the franktenement. Mich. 15 Ja. B. R. between DUTTON AND INGHAM, adjudged per tot. Cur. and that it may be granted over by him in remainder.]

Cro. J. 527. pl. 2. S. C. but not exactly S. P.

[4. *So* if tenant in tail, the remainder in tail are, and he in *remainder purchaſes a rent in fee of J. S. who had it before theſe eſtates created*, yet this does not make any ſuſpenſion, becauſe that he had nothing in the franktenement. Mich. 15 Ja. B. R. in DUTTON AND INGHAM'S CASE; per Houghton.]

S. P. But if the tenant enfeoffs the lord in fee of one acre, the ſeigniory is extinct

[5. If *lord and tenant* are *of three acres by 3d. rent*, and the *tenant leaſes one acre to the lord for years*, this ſuſpends the ſeigniory in the whole; for the ſeigniory may be extinct in part, but not ſuſpended in part, but for the whole. Br. Extinguiſhment, 48. Co. Litt. 148. b.]

for the third part, and remains for the other two parts. Br. Extinguiſhment, cites 32 H. 8.——See Vent. 227. contra. 9 Rep. 135.

[6. *So* if the tenant *leaſes for life, or gives in tail to the lord*, part of the land, this ſuſpends all the ſeigniory. Co. Litt. 148. b.]

Cro. J. 424. pl. 9. S. C. adjudged.—See tit. Statute Merchant (L), pl. 1. and the notes there.

[7. If a man *ſeiſed in fee leaſes for years*, reſerving a rent, *and after acknowledges a ſtatute to J. S. and another* ſtatute *to J. D.* and then *grants the reverſion for years to J. S.* and *leſſee attorns*; this ſuſpends the ſtatute of J. S. by the *acceptance of the leaſe of the reverſion*, as long as the leaſe ſhall continue, though he grants the leaſe over to another. P. 16 Ja. B. R. between SIR J. HARRINGTON AND GARROWAY, adjudged. Tr. 15 Ja. B. R. ſame caſe adjudged.]

Fol. 939.

[8. If *a parſon leaſes his rectory* to another, reſerving rent, and after *takes the tythes* due, ſcilicet, lambs, wool, and corn, this doth not ſuſpend his rent, for this doth iſſue out of the tythes. 28 E. 3. 94.]

[459]

4 Le. 116. pl. 235. Rawlins v. Somerford. Mich. 30 Eliz. B. R. the S. C. adjudged that by the

[9. If a *man leaſe land for twenty-one years* reſerving rent *upon condition to re-enter for non-payment*, and after *leſſee makes leaſe for ſix years, to commence two years after*; this future intereſt made *to the firſt leſſor* ſhall not ſuſpend his rent or condition in the mean time, but that he upon demand of the rent and nonpayment of it may enter for the condition broken. 4 Rep. 52. RAWLINS'S CASE.]

leaſe in futuro the leaſe was not ſuſpended. ——Jenk. 254. pl. 46. S. C. During the two years the leſſee makes default of payment of the rent, the condition is not ſuſpended, but that the firſt leſſor may enter and avoid the demiſe and the re demiſe; for the ſuſpenſion of the condition ariſes by a preſent

ſent intereſt paſſed by the leſſee to the leſſor, ſo that the leſſee ought to have profit of it. So adjudged and affirmed in error.——S. C. cited per Hale Ch. J. Pollex. 68.

[10. If a man makes *feoffment in fee upon a collateral condition*, and after the *feoffee re-demiſes the land to the feoffor, and then the condition is performed*; in this caſe the re-demiſe was no ſuſpenſion of the condition, and therefore no impediment but that the feoffor ſhall take advantage of the condition, and by this *deſtroy the term which he himſelf has accepted*. 1 Rep. 97. SHELLY'S CASE, 174. DIGGE'S CASE. 4 Rep. 53. RAWLINS'S CASE.]

11. *Tenant who holds of the king in chief holds of other lords other lands* and *dies*, his heir within age, the *king ſeiſed the ward*, the ſeigniory is not properly ſuſpended; for the other lords may have petition for their rents to the king, and ſhall have their releaſes. Br. Extinguiſhment, pl. 44. cites 29 Aſſ. 5. and Petition in Fitzh. 5.

12. Where there are *ſeveral jointenants or coparceners* who *hold by ſuit*, and *the part of the one comes to the lord* by purchaſe or otherwiſe, *the whole ſuit is extinguiſhed*; for he cannot be contributory to his companions for his own ſuit. Br. Extinguiſhment, pl. 6. cites 40 E. 3. 40.

13. Where a *man has a leet*, and *the king ſeiſes certain lands within the precinct of the leet*, there the leet is *ſuſpended for this parcel during the ſeiſin of the king* during this time. Br. Extinguiſhment, pl. 8. cites 47 E. 3. 12, 13.

14. A. leaſed to B. for 20 years two acres of land rendering rent, with condition of re-entry. B. leaſed one of the acres to C. for 10 years, and after granted the reverſion of the ſaid term in the ſaid acre to A. Per Cur. this is no preſent ſuſpenſion of the ſaid condition, becauſe there is *not any poſſeſſion*, 3 Le. 221. pl. 294. Paſch. 30 Eliz. in the Exchequer, Brightman's caſe.

15. In caſe of *rent-ſervice*, if the *lord purchaſe part* of the tenancy in fee, part is extinct and in eſſe for the reſidue. 9 Rep. 135. a. Mich. 9 Jac. in the court of wards, in Aſcough's caſe.

16. Remainder in tail or for life expectant on eſtate for life or in tail, ſhall never ſuſpend a *meſnalty, ſeigniory, rent, &c.* But if meſne grants his meſnalty for life or in tail, the remainder to tenant paravail in fee, there the meſnalty is extinct, becauſe he has as high eſtate in the meſnalty as he had in the tenancy. 9 Rep. 134. b. Mich. 9 Jac. in the court of wards, in Aſcough's caſe.

17. *Diſturbance* and *incloſure of common* is no ſuſpenſion of rent; reſolved. Palm. 392. Mich. 21 Jac. B. R. Sanderſon v. Harriſon.

18. *A. having two houſes with a long balcony going out of both, lets one to B. generally, without mention of the balcony*, and *after lets the other to C. with the balcony thereunto belonging*. Afterwards the leſſor divided the balcony unequally, viz. more to the laſt houſe than to the firſt, after which B. the firſt leſſee pays rent; but rent being afterwards arrear, the leſſor brings debt, and B. pleads the entry of the leſſor into his balcony, and making ſuch partition in ſuſpenſion; and it was conceived that this partition was no ſuſpenſion, [460]

penſion, becauſe it was not expreſsly let, and ſo was never out of leſſor's poſſeſſion, being never divided. 3 Keb. 520. pl. 87. Trin. 27 Car. 2. B. R. Anon.

## (I) Suſpenſion by Act in Law.

[1. IF *guardian* in chivalry *enters into the land of his ward within age*, by this the *ſeigniory* is ſuſpended, but if the *feme of the tenant be after endowed* of the third part of the land, now ſhe ſhall pay to the lord the third part of the rent. Co. Litt. 148. 1.]

See (H), pl. 5. that by the act of the party it cannot be ſuſpended in part, but may be extinct in part.

[2. So if the *tenant gives part* of the tenancy *to the father of the lord in tail*, and after the *father dies, and this deſcends to the lord*, in this caſe by act in law the *ſeigniory* is ſuſpended *in part*, and in eſſe for part. Co. Litt. 148. 1.]

[3. *The ſame law* is *of a rent charge.* Co. Litt. 148.]

## (K) Suſpenſion.

### By the Act of God, Enemies, &c.

Sty. 47. Paradine v. Jane, S. C. Roll Ch. J. ſaid that the defendant having pleaded that it was hoſtilis exercitus was not good, but that he ſhould have pleaded that the army were aliens and unknown, for the hoſtilis exercitus makes not the plea more certain than before, and that if the tenant for years covenants to pay the rent, though the lands leaſed to him be ſurrounded with water, yet he is chargeable with the rent, and much more here; and judgment for the plaintiff.——All. 26. S. C. adjudged for the plaintiff; and the Court took a difference where the law creates a duty or charge, and the party is diſabled to perform it without any default in him, and has no remedy over, there the law will excuſe him; as in caſe of waſte, if a houſe be deſtroyed by tempeſt or by enemies the leſſee is excuſed. And reſolved, that though the whole army had been alien enemies, yet the defendant ought to pay his rent.

[1. IF A. *leaſe land* to B. for years rendering rent, and *before the rent arrear* the *enemies* of the king and realm enter into the realm, and *enter into the poſſeſſion of the land and eject the leſſee, and this continues till after the rent-day* is paſt, yet this does not ſuſpend the rent, becauſe it becomes due by *an expreſs agreement* between leſſor and leſſee, and *not by act in law;* for an action of covenant lies againſt leſſee for nonpayment of the rent upon the reſervation, which is an agreement between them, and there is no more reaſon that the leſſor ſhall ſuſtain the damage by the enemies than the leſſee, inaſmuch as the leſſee has full power of the land during the term, and by his own contract is to pay the rent upon all perils. Mich. 23 Car. B. R. between PADINE AND JANE adjudged upon a demurrer in two caſes. Intratur Hill. 22 Car. Rot. 1178 and 1179.]

## (L) Suſpenſion of Perſonal Things.

[1. IF the *obligee covenants with the obligor*, who is bound to perform covenants, *not to moleſt* or ſue *him before ſuch a day*, this is not any ſuſpenſion of the debt, for the proper ſenſe of the words is to have covenant upon it if he ſue him before the day, and not to make this a releaſe. Mich. 37 Eliz. B. per Cur. between DOWSE AND JEFFREYS.]

And. 307. pl. 316. S.C. adjudged accordingly. —Cro. E. 352. pl. 7. Deux v. Jefferies, S. C. adjudged accordingly; but if it had been a covenant that he would not ſue it at all, peradventure it might enure as a releaſe, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a releaſe.

[2. If the obligee *grants* to the obligor *that he ſhall not be ſued* nor vexed *upon the ſaid obligation before ſuch a day, and if he is*, that then *he ſhall plead the ſaid grant as an acquittance, and that the ſaid obligation ſhall be void* and of no effect; this is a ſuſpenſion of the obligation, and ſo by conſequence a releaſe, for * this is a grant, and that he ſhall plead it as an acquittance. 21 H. 7. 23. b. 30.]

Br. Barre, pl. 52. cites S. C.—— Br. Defeaſance, pl. 15. cites S. C.—— * Fol. 940.

Br. Grants, pl. 58. cites S. C. ——Br. Defeaſance, pl. 16. cites S. C. ——S. C. cited Show. 46

## (M) A Perſonal Thing once ſuſpended ſhall be extinct.

[1. IF a perſonal thing be ſuſpended *by an act in law* it ſhall not be any extinguiſhment.]

[2. If a *feme executrix of the debtee takes the obligor to baron*, and after the *baron dies*, this ſuſpenſion is not any extinguiſhment becauſe it was by an act in law and in auter droit. Mich. 30 & 31 Eliz. cites SIR JOHN NEEDHAM'S CASE. 8 Rep. 136. adjudged.]

But if obligee takes obligor to baron it is an extinguiſhment. 1 Salk. 306. ——It is no releaſe of the debt becauſe it would be a devaſtavit; per Gould J. 12 Mod. 290. ——There are divers rights in ſuch caſe; per Holt Ch. J. 12 Mod. 293. ——See (B) pl. 2, 3. and the notes there.

[3. If two oblige themſelves *jointly and ſeverally to one*, and after *obligee makes the feme of one of the obligors executrix* and dies, and after *her baron makes her executrix alſo* and dies, the obligation is extinct by this ſuſpenſion. Tr. 12 Jac. B. adjudged between FRYER AND GILDRIDGE.]

Mo. 855. S. C. & P.—— Hob. 10. S. C.—— Brownl. 76. cited Jo. 345. ——See ſupra (B), pl. 6. S. C. and the notes.

[4. If two oblige themſelves *jointly and ſeverally* to one who *makes the feme of one of the obligors executrix* and dies, *who adminiſters*, this is a releaſe in Law of the debt, inaſmuch as he acknowledges

See ſupra (B), pl. 6. S.C. and the notes there.

knowledges the executrix to be the feme of the obligor at the time of the making of her executrix. Tr. 12 Ja. B. per Cur. between FRYER AND GILDRICH.]

Sty. 384. S. C. adjudged niſi.

[5. If *A. being indebted to B. by obligation*, and after *A. dies inteſtate, and C. after takes poſſeſſion of all the goods of A.* by which he becomes executor de ſon tort, and after *B. takes adminiſtration* of the goods of A. though B. may have a treſpaſs or trover and converſion againſt C. for the goods by way of relation, yet he may alſo have an action of *debt upon the obligation againſt C.* as executor de ſon tort, with an *averment that no goods of the inteſtate came to his hands to ſatisfy* any part of his debt, *and that* the defendant *C. after the death of the inteſtate ſeized all the goods* of the inteſtate before adminiſtration granted to him; for the reaſon that the action of the debtee being the adminiſtrator is ſuſpended when he has aſſets is, becauſe he may retain to ſatisfy himſelf, and the law ſupplies it and gives this power to retain becauſe he cannot ſue himſelf, and here when he has not aſſets he cannot retain, and he is not bound to bring action of trover and converſion as he may, but may alſo bring this action of debt at his pleaſure, for it is well proved that his action is not ſuſpended, inaſmuch as he might have action of debt againſt the heir where he has not any aſſets. Tr. 1653, between ASHBY AND CHILD executor of Blackerley adjudged per Cur. upon demurrer. Intratur Mich. 1652. Rot. 686.]

6. If *creditor marries one of the executors of the debtor* it is an extinguiſhment of the debt. Went. Off. Ex. 31. cites 11 H. 4. 83, 84.

7. If *obligation* is made *by three to one*, and *he makes one of the three his executor* and dies, the obligation is diſcharged againſt all though it is joint and ſeveral. Br. Obligation, pl. 61. cites 21 E. 4. 80.

8. If *two* are *bound to a feme* by obligation, and *ſhe marries one of them*, and after he dies, the debt is diſcharged for ever. Br. Barre, pl. 53. cites 21 H. 7. 29.

9. *Bond to pay rent* reſerved on a leaſe for years. In debt leſſee pleads *re-entry* before the day of payment. On demurrer it was argued, that by *leſſee's re-entry on leſſor*, though the rent was revived, yet the action being perſonal and once ſuſpended is extinct, but overruled by the Court without argument. D. 140. a. Marg. pl. 40. cites Mich. 43 & 44 Eliz. C. B.

10 In *debt on bond*, the defendant pleaded that the plaintiff, after the money was due on the bond, *covenanted* and granted by indenture *not to ſue the defendant in 99 years*; per Holt Ch. J. the ſuſpenſion of this action will not deſtroy the bond; for every defeaſance is quodam modo a ſuſpenſion; *a covenant not to ſue at all is an acquittance*, but a covenant not to ſue a bond within ſuch a time goes only in covenant; that the rule that a perſonal action once ſuſpended is for ever extinct does not hold in all caſes, and Dolben agreed; and judgment for the plaintiff. Comb. 123. Trin. 1 W. & M. in B. R. Anon.

11. Bond

11. Bond to pay money after *marriage between obligor and obligee*, the debt is only ſuſpended by the intermarriage; per two juſtices contra Holt. 1 Salk. 325. Hill. 17 W. 3. B. R. Gage or Grey v. Acton.

## (N) Suſpenſion avoided. [463]

[1. IF a man *leaſes a rectory* for years reſerving a rent, and *upon part of the glebe* in a corner of the cloſe *is a ſheepcote*, and the *leſſor enters and pulls it down*, and the *leſſee re-enters*, and *after the rent is arrear*, the rent is ſuſpended notwithſtanding the re-entry of the leſſee into the toft, for part of the profit of the thing leaſed is taken from the leſſee, ſcilicet his houſe, and this by the act of the leſſor. M. 37 El. B. R. per Popham and Gawdy.] Cro. E. 341. pl. 8. Mich. 36 & 37 Eliz. B. R. Cherburn v. Rye. Like point as to pulling down part of the houſe, but ſeems to be S. C. and held accordingly by Popham and Gawdy, but Fenner and Clench doubted; et adjornatur.

[2. If the *leſſor of a wood or orchard* rendering rent *cuts them down*, and the *leſſee enters*, yet the rent is ſuſpended, quære this.]

3. *Aſſiſe may be ſuſpended and revived*; per Ston. Juſtice. Br. Aſſiſe, pl. 482. cites 13 E. 3. and Fitzh. title.

4. *As if diſſeiſor enfeoffs W. who dies ſeiſed*, and his *heir enters* and *leaſes to the diſſeiſor for the life of a ſtranger*, upon whom the *diſſeiſee re-enters*; the *firſt diſſeiſor brings aſſiſe and recovers*; the *heir and ceſtuy que vie die*; the *diſſeiſor is heir to the heir of the feoffee* againſt whom the diſſeiſee brings aſſiſe. The diſſeiſor pleads the recovery in the firſt aſſiſe againſt the plaintiff, there the plaintiff may *confeſs and avoid* the firſt recovery in the aſſiſe without attaint, becauſe the *firſt aſſiſe was of the ſecond diſſeiſin*, and *this aſſiſe is of the firſt diſſeiſin*, and ſo the aſſiſe which was ſuſpended by the deſcent is now revived; per Ston. J. Br. Aſſiſe, pl. 482. cites 13 E. 3. S. P. Br. Extinguiſhment, pl. 46. cites 13 E. 2.

5. If a man be *condemned upon recognizance by erroneous judgment*, and after *is outlawed, and has* charter of *pardon*, he ſhall have writ of error, and the outlawry is no plea; for this action is revived in him, for it is not like to an obligation; for there if the one be outlawed the obligation is forfeited; but here he *is not to recover* any thing, *but to diſcharge him* of the execution. Br. Extinguiſhment, pl. 41. cites 29 Aſſ. 47. Br. Revivings, pl. 6. cites S. C.

6. If a man is *beat or impriſoned, and after is outlawed, and* then *gets charter of pardon*, now *the action of treſpaſs is revived* by award; quod nota. Br. Revivings, pl. 7. cites 29 Aſſ. 63. Contra of goods carried away; per Shard; for the king may have the goods, therefore the action is gone by the outlawry. Ibid.

7. Note, that Thirn. ſaid, that in the time of R. Thorpe, the opinion of him and of his companions was, that where a *manor or ſuit of tenants of it deſcends to two daughters, who make partition, that the one ſhall have the demeſnes, and the other the ſervices*, ſhe who has the demeſnes ſhall not have the ſervices nor ſuit; for the other has

the ſervices, and ſhe who has the ſervices ſhall not have the ſuit; for ſhe has no manor nor the ſuit of it, but in this caſe *if the one parcenor dies without iſſue*, the *other ſhall have the ſuit again*, for the ſuit was not extinct, but only ſuſpended; quod nota & *quære*; for the manor was once defeated. Br. Extinguiſhment, pl. 13. cites 12 H. 4. 25.

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S. P. per Holt Ch. J. 1 Salk. 248. pl. 3. Paſch. 12 W. 3. B. R. in caſe of Vaſper v.

8. If a man *takes a diſtreſs* for rent, and upon avowry hath return irrepleviſable, if *the beaſt dies in* the *pound*, the party may diſtrain de novo. Hob. 61. in caſe of Foſter v. Jackſon, cites 14 H. 4. 4. 15 E. 4. 10.

Eddowes. —— 12 Mod. 658. S. C. cites D. 280. Hob. 61. & 15 E. 4. 10. if the dying be in a pound over for want of food. —— Ld. Raym. Rep. 720. S. P. Arg. in S. C. that the diſtrainer may have action of treſpaſs or diſtrain again, cites Dr. and Stud. cap. 27. —— But ſee Br. Retorn de avers, pl. 17. ſays that the defendant has no remedy but to diſtrain de novo; cites 21 E. 3. 22.

Co. Litt. 319. a. S. P. and Marg. cites S. C. and ſays that by the regreſs the rent is revived, becauſe it is incident to the reverſion, and that ſo it has been adjudged.

9. The opinion of two juſtices was, that where a man *leaſes for* term of *years rendering rent, and ouſts the leſſee and makes a feoffment in fee*, and the *leſſee re-enters*, the rent is revived by reaſon the reverſion is revived. But *quære* inde, for he made the feoffment diſcharged of all rents; but the *reverſion and the fee-ſimple was parcel of the eſtate of which the feoffor was ſeiſed at the time of the diſſeiſin and feoffment made*; and therefore a diverſity. Br. Extinguiſhment, pl. 4. cites 9 H. 6. 16.

But if a man be ſeiſed of a rent in fee and diſſeiſes the tenant of the land and makes a feoffment in fee, and the tenant re-enters, this rent is not revived. And ſo note a diverſity between a rent incident to a reverſion, and a rent not incident to a reverſion.

10. If a *feoffor upon condition does treſpaſs* upon the land, *and after performs the condition and enters*, yet the feoffee ſhall have action of treſpaſs, quod fuit conceſſum, by reaſon that he affirmed the firſt poſſeſſion. Br. Relation, pl. 44. cites 4 H. 7. 10.

* This ſeems to be a miſtake, for there it is ſaid to be adjudged 10 H. 7. fol. 22. that the plaintiff took nothing by his writ; which agrees with the Year-book.

11. *So* by ſome, where a man *recovers by erroneous judgment, and he who loſes does treſpaſs* upon the ſame land, *and after reverſes* the judgment by error, and is reſtored to the land and meſne profits, the other ſhall not have treſpaſs. But by ſeveral contra, and that he who recovers ſhall have action of treſpaſs by reaſon that he is charged to render the meſne profits, and therefore circuity of action ſhall be ſuffered there, and therefore it is *no relation which may avoid the meſne actions that are veſted*. Br. Relation, pl. 44. cites 4 H. 7. 10. * But Brook ſays, ſee tit. Treſpaſs, 425. this caſe abridged that the action of treſpaſs lies well. Ibid.

12. If *treſpaſs is done againſt the heir, and after the eldeſt brother is deraigned*, yet treſpaſs lies for the firſt heir; for it is an action veſted, per Fiſher. Br. Parliament, pl. 41. cites 4 H. 7. 10.

13. *The ſame* ſeems to be *of a ſon born after the death of the father, where a daughter was heir for the time*, the daughter ſhall have treſpaſs. Ibid.

14. If the *abbot of B.* be *bound in an obligation by his own ſeal*, and after is *tranſlated to the abbey of St. A.* action of debt lies againſt him as abbot; per Vaviſor for law. *Otherwiſe* it ſeems

where he is *depoſed, and after* is *re-elected* abbot in this houſe or in another, for there the action was once extinct, contrary here. Br. Nonabilitie, pl. 28. cites 9 H. 7. 23.

15. Note per Fitzherbert and Norwich J. that if a man *be bound to a feme ſole*, and *after marries her*, and after they are *divorced*, the feme ſhall have action upon the obligation though it was once ſuſpended; quod quære. Br. Extinguiſhment, pl. 1. cites 26 H. 8. 7.

16. If the *lord diſſeiſe the tenant, and is diſſeiſed*, the *diſſeiſee releaſes to the ſecond diſſeiſor*, yet the *ſeigniory is not revived;* for between the parties the releaſe enures by way of entry and feoffment as to the land; but not having regard to the ſeigniory, and for that the poſſeſſion was never actually removed or reveſted from [ 465 ] the diſſeiſor, who claimeth under the lord, the ſeigniory is not revived. Co. Litt. 278. b.

*But* if the *lord and a ſtranger diſſeiſe the tenant*, and the *diſſeiſee releaſes to the ſtranger*, there the ſeigniory by operation of law is revived, for the whole is veſted in the ſtranger which never claimed under the lord. And in that caſe, if the lord had died, and the land had ſurvived, the ſeigniory had been revived. But if the *lord* had *diſſeiſed the tenant, and been diſſeiſed by two*, and the *diſſeiſee releaſed to one of them;* the ſeigniory is not revived, becauſe he claimed (as hath been ſaid) under the lord. Co. Litt. 278. b.

17. In *debt for rent*, the defendant confeſſed the leaſe and the rent reſerved on it, but *pleaded a preſcription for common in ten acres in E.* for beaſts levant and couchant on the ſaid tenements every year after the corn ſowed, from 7 Auguſt till the corn reaped and carried away; *and that before any rent became due, the plaintiff encloſed the ſaid ten acres, ſo that the defendant could not uſe his common;* and that thereby his rent was extinct. But on demurrer it was inſiſted that this land incloſed is *not alleged to be ſown with corn; and if not, by his preſcription he is not to have common;* beſides he did *not allege that the plaintiff kept thoſe ten acres encloſed with force*, and otherwiſe he might break the hedges and take his common; and further that alleging the rent to be extinguiſhed by the incloſure is vain; for the rent is not iſſuing out of the common, and ſo the incloſing cannot ſuſpend it; and of that opinion was all the Court, and that the plea was ill upon the firſt exception; and judgment for the plaintiff. Cro. J. 679. pl. 16. Mich. 21 Jac. Sanderſon v. Harriſon.

Palm. 392. S. C. reſolved. — 2 Roll. Rep. 415. S. C. reſolved.

18. *Covenant upon indenture for non-payment of rent;* the plaintiff declares that he was ſeized of tythes, and by indenture demiſed them to the defendant rendering rent, and the defendant covenanted to pay it, and he aſſigned his breach in non-payment of ſo much; and the defendant pleaded eviction. The plaintiff demurred; and judgment was given for the defendant, becauſe it is a rent, and the *eviction is a ſuſpenſion* of it, and therefore a good plea. Ex. Relatione m'ri Mather. Ld. Raym. Rep. 77. Paſch. 8 W. 3. Dalſton v. Reeve.

Ld. Raym. Rep. 521. S.P. in S.C. obiter agreed by Holt Ch. J.

19. If a man *obligor marries* a woman *obligee* who are *divorced*, the debt revives, and the man ſhall be ſued by the woman again. 12 Mod. 290. Paſch. 11 W. 3. in the caſe of Cage v. Acton.

becauſe the divorce being a vinculo matrimonii by reaſon of ſome prior impediment, as pre contract, &c. makes them never huſband and wife ab initio; but if the huſband had made a feoffment in fee of the lands of the wife, and then the divorce had been, that would have been a diſcontinuance as well as if the huſband had died, becauſe there the intereſt of a third perſon would have been concerned, but between the parties themſelves it will have relation to deſtroy the huſband's title to the goods; and it amounts to no more than the common rule, viz. that relation will make a nullity between the parties themſelves, but not among ſtrangers.

And it was compared to the caſe of excommengement pleaded where the judgment is remaneat loquela fine die quouſque, &c. which is but a temporary plea, by

20. In *debt upon a bond* it was pleaded in bar that in a former action upon that bond the defendant had pleaded the late *ſtatute* of the king *laying taxes upon bonds* for ſecurity of money, and *that none ſhould recover* ſuch debts if they had *not taxed* the ſame; *and* that *upon that plea the plaintiff was barred;* and it was objected, that ſtatute was only a *temporary law*, and now expired; and therefore the impediment being removed the plaintiff ſhould recover. But per Holt, here the defendant had a good plea when the firſt action commenced, and time ſhall not wear it out. 12 Mod. 400. Paſch. 12 W. 3. B. R. Lady Faulkland v. Stanion.

which the parties are put out of Court, but may be brought in by a re-ſummons or re-attachment, but where outlawry is pleaded in abatement after pardon and reverſal thereof, party muſt begin de novo. 12 Mod. 400. Lady Faulkland v. Stanion.

* And Co. Litt. 128. b. and 135. b. is to be underſtood upon this diverſity when the cauſe of action accrues to plaintiff at a time at which he is under the diſability of an outlawry; there the plea of outlawry in abatement ſhall quite overthrow the writ, and after removal thereof he muſt begin de novo; but where the diſability of outlawry comes after the cauſe of action accrued, there the plea of outlawry is only a temporary diſability, which does not abate the writ, but is only quouſque; and after removal thereof he may re-continue the action by re-ſummons, &c. 12 Mod. 400. Lady Faulkland v. Stanion.

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21. Where the *ſame hand is to receive as is to pay*, it is an extinguiſhment. Per Holt Ch. J. 1 Salk. 305. Hill. 1 Ann. B. R. in caſe of Wangford v. Wangford.

## (O) Extinguiſhment. Quoad one and not quoad another.

4 Le. 235. Anon. As grantee of a rent-charge for

1. TO ſome purpoſes by the common law *rent* extinct ſhall be ſaid *in eſſe as to a ſtranger*. 7 Rep. 37. b. Mich. 5 Jac. Lillingſtone's caſe.

life acknowledges a ſtatute, and afterwards releaſes to the terre tenant.——239. S. P. per Cook Ch. J. Duncom's caſe.——2 Roll. Abr. Statutes, 471. (O) pl. 5. Duncomb v. Tillington.—— If rent deſcends to the tenant of the land it ſhall be aſſets though it be extinct. 2 Roll. Voucher, (Z. b) pl. 8.——A. leſſee for 17 years gave a bond to B. his leſſor to pay to C. 10 l. per ann. for the 17 years if he or his aſſigns ſhould or might enjoy the land ſo long. A. within the term ſurrendered his leaſe, which the leſſor accepted; yet he is ſtill liable to the annuity to C. and as to him the eſtate is not determined. And debt lies on the bond; for the condition is collateral, Cro. E. 313. pl. 4. Hill. 36 Eliz. B. R. Ford v. Hollingborough.

2. *Rent releaſed by baron*, yet after his death ſhall be ſaid to be in eſſe as to the wife for her *dower*. 7 Rep. 37. b. Mich. 5 Jac. in Lillingſton's caſe. 6 Rep. 79. a. in Ld. Abergaveny's caſe.

3. One *jointenant releaſed* to the other, yet his part ſhall be ſaid in eſſe as to *execution on a judgment* obtained by J. S. againſt releaſor. 6 Rep. 78. b. Paſch. 5 Jac. Ld. Abergaveny's caſe.

4. *Eſtate tail* may be extinguiſhed *as to the iſſue*, and yet be in eſſe as to ſupport a leaſe or other *charges prior*. Bridgm. 29. Crocker v. Kelſey. Cro. J. 688. pl. 5. Trin. 21 Jac. S. C. —Jo. 60. S. C. held accordingly. —— 2 Roll. Rep. 490. 499. S. C. adjudged.

5. *Reverſioner for life of a leaſe for years grants a rent*, and afterwards *joins in a grant with reverſioner in fee*, the eſtate of reverſioner for life continues as to the grantee of the rent; but revera the eſtate for life is drowned in the reverſion in fee. Jo. 305. pl. 16. Mich. 8 Car. B. R. in caſe of Major v. Talbott. 2 Roll. Surrender (C) pl. 9. cites 20 E. 4. 13. b.

6. *Tenant for life grants a rent* and then *ſurrenders*, yet the rent ſhall continue during his life. 12 Mod. 293. Paſch. 11 W. 3. in caſe of Cage v. Acton. Ld. Raym. Rep. 520. S. C. & S. P. for that things ſhall be extinguiſhed between the parties which yet ſhall remain, and have exiſtence as to ſtrangers.

7. A *man having rent in fee confeſſes a ſtatute* and then *releaſes* the rent, yet it ſhall have exiſtence as to the conuſee. 12 Mod. 293. Paſch. 11 W. 3. in caſe of Cage v. Acton.

## (P) Of Part where it ſhall be of the Whole. [467]

1. IF the *lord releaſes his ſeigniory in part of the tenancy*, all the ſeigniory is gone by his own act. 6 Rep. 1. b. in Bruerton's caſe, cites Litt. 49. a. [ſ. 222.] and 5 E. 2. tit. Avowry, 206.

2. If a man *has a rent-charge iſſuing out of four acres* of land, and *releaſes his right in the one acre*, all is extinguiſhed; for it is his own act; per Thorp. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

3. If a *falſe verdict* be found, and the party grieved makes a *feoffment of* part, he ſhall not have *attaint* for any part. Arg. Ow. 21. cites 38 E. 3. and 12 H. 6. So in 19 H. 6. and 39 Aſſ.

4. In caſe of a common perſon, if an *entire thing* be divided or extinguiſhed *in part*, by the act of the party, it is an extinguiſhment of the whole; but otherwiſe it is where it is by the *act of God or the law*. And. 175. pl. 211. Mich. 29 & 30 Eliz. Knight v. Brech, alias Beech.

5. *Lord* accepts part of the *tenancy*, all the entire *ſervices* are *extinct*. 5 Rep. 1. b. Hill. 36 Eliz. in the court of wards, in Bruerton's caſe. Unleſs where ſuch ſervices are *pro bono publico*, &c.

Ibid. —— And where part of the tenancy comes to the ld. *by act of law*. Ibid. 2. —— So of a rent-ſervice, if the lord purchaſe part of the tenancy in fee, part is extinct and in eſſe for the reſidue. 9 Rep.

9 Rep. 135. in Aſcough's caſe.——If one has a rent ſervice and he purchaſes the reverſion or remainder in fee, all the whole ſeigniory is extinct; but a rent-charge is not extinct by ſuch purchaſe, for it is chargeable upon the poſſeſſion, and he ſhall avow as in land chargeable to his diſtreſs. Per Gawdy J. Cro. E. 226. Paſch. 33 Eliz. B. R. in caſe of Garnon v. Weſton.

Ibid. ſays that with this accords 40 E. 3. and F.N.B. 209. (A.)

6. As to *intire ſervices* when the *lord comes to any parcel by a mere act in law, and partly by the act of the party*, and namely, *when the original act is the act of the party*, as where parcel of the tenancy is recovered in a ceſſavit, all the intire ſervices which are for the benefit of the lord are extinct and gone. 6 Rep. 2. b. Hill. 36 Eliz. in the Court of Wards. Bruerton's caſe.

Ow. 21. S.C.—Cro. E. 469. S. C.

7. There is a *difference* between a *right of action and a* right *to the land*; for in the firſt caſe if there be a ſuſpenſion or *extinguiſhment* in part, it is extinguiſhed for the whole; but where there is right to the land it may be releaſed or ſuſpended in part, and remain good for the reſidue. Mo. 413. pl. 569. Trin. 37 Eliz. Wright v. the Mayor of Wickham.

Mo. 413. Wright v. the Mayor of Wickham, S. C.

8. If he that has cauſe to bring a writ of *error* or *attaint* takes a *leaſe of* part, he ſuſpends his action; and if he takes a *feoffment* of it, it is quite gone. Arg. Ow. 21. 37 Eliz. B. R. in Wright's caſe.

Mo. 413. S. C. Roll. 788. pl. 10. S. C.— Ow. 21. S. C.—— Lev. 72. Winn v. Floyd.

9. If one has title to a writ of *error* to reverſe a *fine* makes a *feoffment of part* of the land, the feoffment only deſtroys the title of error for that part. Cro. E. 469. (bis) pl. 27. Paſch. 38 Eliz. B. R. Wright v. Wickham.

10. There is a difference between a *condition* compulſatory and a *power of revocation* that is voluntary. In the laſt caſe a man may by his own act extinguiſh his power in part, as by levying a [ 468 ] fine of part, and yet the power remain for the reſidue, becauſe *it is in nature of a limitation and not of a condition.* Co. Litt. 215. a. cites it as reſolved, Mich. 40 & 41 Eliz. in the Earl of Shrewſbury's caſe.

11. *Condition* or *limitation* annexed to the eſtate of the land ought to *deſtroy* all the eſtate to which it is annexed, and not part of it. 1 Rep. 86. b. Paſch. 42 Eliz. C. B. in Corbet'. caſe.

12. A *licence diſpenſing* with part ſhall be for the whole; per Coke Ch. J. 2 Bulſt. 291. cites 4 Rep. 120. [a. Hill. 45 Eliz. B. R.] Dumport's caſe, and the caſe there cited of Leeds v. Crompton.

13. A *releaſe of common in one acre* is an extinguiſhment of the whole common; per Curiam. Show. 350. Paſch. 4 W. & M. in caſe of Miles v. Etteridge.

For more of Extinguiſhment, ſee **Common** (E. a), **Condition** (I. d) K. d), **Copyhold** (F. d), **Feoffment** (A. 2), **Fines** (A. 2), **Franchiſes** (C), **Heriot** (H), **Manor** (O) (R. 2), **Merger. Releaſe. Revive. Tenure** (B. a), and other proper titles.

# Extortion.

## (A) What is Extortion. And who may be guilty of it.

1. TRESPASS of *graſs cut*, the *defendant ſaid that after the treſpaſs he was amerced in the plaintiff's court for the ſame treſpaſs, which was affeered at 2s. of which he has made gree to the plaintiff*, and held a good plea by the acceptance of it, though the amercement of the court baron be *extortion*, quod nota. Br. Treſpaſs, pl. 66. cites 48 E. 3. 8.

Br. Court Baron, pl. 18. cites S. C.—— S. P. Br. Treſpaſs, pl. 100. cites 12 H. 4. 8. ——Ibid. pl. 195. cites 39 E. 3. 20.

2. Extortio *eſt crimen quando quis colore officii extorquet quod non eſt debitum*, vel *quod eſt ſupra debitum, vel ante tempus quod eſt debitum*, and this is called *crimen expilationis* & crimen *concuſſionis*. 10 Rep. 102. a. Mich. 10 Jac. in Beawſage's caſe.

Co. Litt. 368. b. S.P. —Hutt. 53. Hill. 17 Jac. in caſe of Empſon v. Bathurſt, S. P. & S. C. cited.

3. If an officer or judge takes *more than the uſual fees* he is puniſhable at common law. Per Chamberlain J. 2 Roll. Rep. 263. Mich. 20 Jac. B. R. Smith v. Mall. [ 469 ]

4. Bond *to pay fees before they are due* is extortion. Raym. 62. in caſe of Norfolk v. Aylmer, cites 2 Inſt. 210.

Hut. 52.—So of a promiſe by a ſtranger. Cro. J. 103. Bridge v. Cage.

5. In every oppreſſion there ought to be a threatening of the party; for the *voluntary payment* of a greater ſum where a leſs is due cannot be ſaid extortion. Godb. 438. pl. 583. Mich. 4 Car. in the Star-Chamber. Floyd v. Sir Thomas Cannon.

6. *Church-wardens* of St. Martyn's were indicted for extortiouſly *taking* of one Reynel a *ſilver cup for making him gallery-keeper in the church*; Keeling ſaid this was no offence, nor ſuch an office whereupon extortion can be grounded, but a bare employment. But the Court would not quaſh it without trial; for then it will appear

Sid. 307. pl. 17. The King v. Eyres. S.C. accordingly.

appear whether the cup were great or little, exacted or freely given; and per Keeling, if the church-wardens have accounted for it, it ſhall be quaſhed, but not elſe. 2 Keb. 100. pl. 27. Mich. 18 Car. 2. B. R. The King v. Ayres & al'.

7. *Bailiffs* taking *exceſſive bail*, as 40l. where the plaint was but of 30s. an information was ordered againſt them for this extortion. 1 Keb. 873. pl. 23. Paſch. 17 Car. 2. B. R. Randal v. Keite.

Show. 390. S.C. & S.P. by Holt Ch. J.— 3 Salk. 198. pl. 1. S. C. held accordingly.

8. Every ſeveral taking is a *ſeveral* extortion, and it is not good to lay too many extortions together; per Holt Ch. J. Cumb. 194. Paſch. 4 W. & M. in B. R. The King v. Roberts.

held accordingly; for every taking was a ſeparate offence. ——4 Mod. 100. 103. S. C. held accordingly. ——Carth. 276. S. C. held accordingly.

1 Salk. 131. pl. 5. Hill. 7 W. 3. in B. R. Anon. S.P. held accordingly.

9. *Under-ſheriff refuſing to execute proceſs* till he has his fees; if the party pays him the fees ſo before-hand, he may after indict him of extortion. 1 Salk. 330. pl. 3. Mich. 6 W. & M. in B. R. Heſcot's caſe.

10. An indictment for extortion againſt an *officer* for *taking money for not carrying his priſoner to a ſpunging-houſe;* the Court looked upon it to be ſo ill a practice, that they would not hear a motion to quaſh it. 12 Mod. 255. Mich. 10 W. 3. The King v. Beechcroft.

11. A *juſtice of peace's clerk* may commit an extortion; per Holt Ch. J. 12 Mod. 512. Paſch. 13 W. 3. Anon.

12. An indictment was againſt ſeveral for intending to defraud A. of his money, and that they *threatened to ſend* him *to Newgate by colour of a warrant, and to indict him of perjury, unleſs he would give them money* and a note, which he did by reaſon of their threats; and judgment for the queen. 11 Mod. 137. Mich. 6 Ann. B. R. The Queen v. Woodward.

## (B) Puniſhable. How.

1. THE ſtatute of Weſtm. 1. cap. 26. adds a greater penalty than the common law did give; for by this act the plaintiff ſhall recover his double damages, and beſides, they ſhall be puniſhed at the will of the king, viz. by the king's juſtices before whom the cauſe depended. 2 Inſt. 210.

2. This term, Nelme *a bailiff* in Whitechapel being indicted and convicted of extortion was *fined* 13*l.* 6*s.* 8*d.* *to be impriſoned one week without bail, and* then *till he found ſureties for his good behaviour, and diſabled for ever hereafter to execute the office* of bailiff or under-bailiff. MS. Rep. (ſaid to be a copy of Ld. Ch. J. Keyling's) Mich. 15 Car. 2. B. R. Nelm's caſe.

Keb. 623. pl. 98. S.C. the defendant was convicted of extortion, but does not ſay what his puniſhment was.

3. The *governor of the Gatehouſe priſon* in Weſtminſter was found guilty of extortion and hard uſage of the priſoners in a moſt barbarous manner, and *was fined* 100 *marks and removed from her office.* Raym. 216. Mich. 24 Car. 2. B. R. The Lady Broughton's caſe.

2 Lev. 71. The King v. the Lady Broughton, S. C. reports that ſhe was fined 500 *l.* and put out of her office.

4. An *action* lies *againſt a ferryman* for extorting *money for paſſage of one that is toll-free by cuſtom* contrary to the cuſtom, becauſe there is no other remedy. Carth. 194. Trin. 3 W. & M. in B. R. in caſe of Pain v. Patrick.

5. It is againſt the courſe of the Court to *quaſh an indictment* for oppreſſion or extortion; per Cur. we cannot do it. Demur to it. 5 Mod. 13. Mich. 6 W. & M. The King v. Wadſworth.

6. *Upon affidavit* of extortion, though the *courſe is* to take a recognizance to anſwer interrogatories, yet in caſe of great oppreſſion the Court may *commit the party*, and he muſt anſwer in vinculis; per Holt Ch. J. Cumb. 448. Trin. 9 W. 3. B. R.

7. Indictment was againſt A. and others, for that being *receivers of the queen's tax*, they *colore officii extorted money from ſeveral perſons.* On motion in arreſt of judgment, it was held that two men may be *indicted jointly* for a battery or extortion, becauſe it is a crime at common law, of which they may be jointly or ſeverally guilty. 1 Salk. 382. pl. 32. Paſch. 5 Ann. B. R. The Queen v. Atkinſon.

## (C) Pleadings.

Le. 59. S. C. cited.

1. THE *place where* the extortion was committed ſhould be ſet down in the *declaration*. See Pl. C. 200. Stradling v. Morgan.

2. The *ſum certain* extorted muſt be particularly ſet forth, and he cannot ſay that the defendant did extort divers ſums from divers men generally; and ſo it was adjudged in REIGNOLD'S CASE in [ 471 ] this Court; per Richardſon Ch. J. Godb. 438. pl. 583. Mich. 4 Car. in the Star-chamber; Floyd v. Cannon.

3. If the charge is for *oppreſſing A., B., and C.* particularly, *and* 100 *men generally*, the *proof* muſt be firſt as to A., B., and C. before any be given as to the others. Godb. 438. pl. 583. Mich. 4 Car. in the Star-chamber. Floyd v. Cannon.

Keb. 257. pl. 47. the King v. Gover. S. C. adjudged for the plaintiff, it being after a verdict he needed not ſhew particular cauſe.

4. Indictment of extortion againſt a bailiff of a hundred did *not expreſs the cauſe, but ſaid only that colore officii* he took ſo much and held good; but the book ſays, that perhaps if it had been upon demurrer it might be otherwiſe. Sid. 91. pl. 13. Mich. 14 Car. B. R. The King v. Cover.

5. It was moved to quaſh an indictment againſt a miller for taking too great toll, becauſe it was not ſaid jurat' nor onerat' nor the jurors named. But per Curiam, it is againſt the courſe of the Court to quaſh an indictment againſt extortion or oppreſſion, and we cannot do it; and bid them demur to it. 5 Mod. 13. Mich. 6 W. & M. The King v. Wadſworth.

Extortion is a ſpecific offence, and is neceſſary to be ſet forth as felonice in an indictment; per Holt Ch. J. 11 Mod. 82. Paſch. 5 Ann. B. R. The Queen v. the Clerk of the Peace of Cumberland. S. C.

6. A complaint and charge of extortion *ought to be particular*, and that the defendant took it *extorſive, & colore officii*. 2 Salk. 680. pl. 2. Paſch. 5 Ann. in Cam. Scacc. The Queen v. Baynes.

See tit. Fees (A), and other proper titles.

# (A) Extraparochial.

1. THE king ſhall have *all tithes* in places which are *out of every pariſh*, as *in the foreſt* of Rook, Englewood, &c. and may grant it by his letters patents, quod nota. Br. Prerogative, pl. 47. cites 22 Aſſ. 75.

Br. Diſmes, pl. 10. cites S. C.—Br. Prerogative, pl. 143. cites S. C.——

Br. Scire Facias, pl. 154. cites S. C.

2. Lands muſt be *parcel of a pariſh either by preſcription or by act of parliament;* per Cur. Sti. 137. Mich. 24 Car. in caſe of Baniſter v. Wright.

3. If a place is extraparochial, and has not the face of a pariſh, the *juſtices* have no authority to ſend any *poor perſon* thither; poſſibly a place extraparochial may be *taxed in aid* of a pariſh, but a pariſh ſhall not in aid of that; per Holt. 2 Salk. 486. pl. 44. Hill. 11 W. 3. B. R. Precinct of Bridewell v. Clerkenwell.

Carth. 415. S. C. and ſtatutes concerning ſettlement of poor extend not to extraparochial places, but that is cauſus omiſſus.——8 Mod. 49. Trin 7 Geo. The King v. Saint Peter's Pariſh in Oxford.

4. If a place be a *reputable pariſh* and have church-wardens and overſeers of the poor it is within 43 *Eliz.* though in truth it be no pariſh; but if it be *merely extraparochial*, as the juſtices cannot ſend to ſuch a place, ſo they cannot ſend from it, as it is exempt from receiving ſo it ſhall not have the benefit of removing; for they have not proper perſons to complain; perſons in extraparochial places muſt *ſubſiſt on private charity* as all perſons did at common law before 43 Eliz. which enacts that every pariſh ſhall keep their own poor; and that act does not extend to extraparochial places. Per Holt Ch. J. 2 Salk. 487. pl. 48. Trin. 12 W. 3. B. R. Inhabitants of the Foreſt of Dean v. the Pariſh of Linton. [ 472 ]

5. *One ſettled in a pariſh removes into an extraparochial place where he gains a ſettlement*, and *then removes into another pariſh* where he becomes chargeable. The queſtion was, What this laſt pariſh can do with him? Whether by the ſtatute that enables them to ſend ſuch a one to the laſt pariſh where he was laſt legally ſettled, they

they may ſend him to the pariſh he lived in before he removed to the extraparochial place? For ſend him to the extraparochial place they cannot, for want of proper officers to receive him. Powell J. took this to be caſus omiſſus, and what ought to be moved in parliament, theſe extraparochial places being many in number and of great extent. 10 Mod. 81. Hill. 10 Ann. B. R. The Queen v. Doughton.

6. By virtue of 13 & 14 Car. 2. cap. 12. ſ. 21. the *juſtices may exerciſe the powers given by* 43 *Eliz.* and that act in all extraparochial places containing more houſes than one, ſo as to come under the denomination of a vill or townſhip. Adjudged by Parker Ch. J. and tot. Cur. 2 Salk. 486. pl. 44. in Marg. cites 11 Ann. B. R. Stokelane Inhabitants v. Dolting.

7. The *ſtatute of* 43 *Eliz.* 2. extends to extraparochial places, and ſo do all poor acts when ſuch places are within the ſame miſchief as other pariſhes, and ſhall be ſubject to the control *of the* juſtices of peace, and the penalty for not meeting in the church ſhall never be inflicted on the overſeers of the poor, becauſe the inhabitants of ſuch places have no church to meet in. Moſt of the foreſts in England are extraparochial, and ſo is Chriſt-Church in Oxford, but they ought to *maintain their own poor.* 8 Mod. 39. Paſch. 7 Geo. Rufford Pariſh's caſe.

For more of Extraparochial, ſee other proper titles.

END OF THE ELEVENTH VOLUME.